IN THE

Supreme Court of the United States

OCTOBER TERM, 1926

No. 227

BURNRITE COAL BRIQUETTE COMPANY,
a Corporation,
Petitioner,

vs.

EDWARD G. RIGGS and ALFRED L. KIRBY and JOHN P. DUFFY, as receivers of Burnrite Coal Briquette Company,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

JAMES J. LYNCH,
GEORGE W. C. MCCARTER,
Counsel for Petitioners.

FRATERNITY PRESS, 613 SIXTH STREET N. W.

SUBJECT INDEX

TABLE OF CASES AND OTHER AUTHORITIES

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

Unjust Criticisms of the Officers of the Corporation

The criticism of Mr. Crossman, the President of the Burnrite Coal Briquette Company and his associates is not supported by the Record. All the insinuations

against Mr. Crossman's management were explained fully in his affidavits at pages 26 to 32, 196 to 203, and in great detail in his affidavit at pages 209 to 221 of the Record. Also in affidavits of George M. Rubinow, R. p. 37; Henry C. Rodeman, R. p. 33; Herman Roth, R. p. 222; Edw. C. Smith, R. p. 222; Edw. M. Rodnock, R. p. 221; Daniel Van Winkle, R. p. 225; Oscar P. Shaller, R. p. 226; B. Gramitica, R. p. 227; John Stolz, R. p. 228; Joseph Kremer, R. p. 229; George W. Bogen, R. p. 230; John B. Lux, R. p. 230; John E. Lux, R. p. 232; J. P. Lux, R. p. 233; J. B. Lux, R. p. 234 and Andrew Fisher, R. p. 235.

The Court of Appeals expressly states that in this case "*No question of fraud is involved.*" (R. p. 266).

II.

Receivers Having Been Wrongfully Appointed the Property Cannot be Burdened with the Expenses of the Receivership.

While of course we very confidently insist that the Court was without any jurisdiction whatever to appoint the receivers, still, if the Court should find that the term "jurisdiction" was improperly used in the first opinion of the Circuit Court of Appeals and that the appointment of the receivers was wrongfully made by a Court having jurisdiction, the practical result would be the same as if the appointment had been made without jurisdiction so far as the rights of the parties of this particular case are concerned.

It cannot be disputed that the corporation vigor-

ously resisted the appointment of receivers throughout. There is no pretense that there was any acquiescence except in the failure to use the word "jurisdiction" in its objections to the receivership.

If, therefore, the defendant's property was wrongfully taken from its possession without its consent and over its vigorous protest, how can it justly be burdened with the cost and expenses of this wrongful receivership in addition to its loss of the right to use its property for nearly five years.

If adversary counsel is right and there was no lack of jurisdiction, then it certainly cannot be denied that there was in fact a wrongful exercise of that jurisdiction because the decree of the Circuit Court of Appeals has conclusively adjudicated the fact that the appointment was wrongful. If that conclusion is reached then there could certainly have been no acquiescence on the part of the Company in the fact that its counsel failed to insist that there was a want of jurisdiction. In other words, the corporation urged every possible defense that adversary counsel now insists they had a right to make. It is an elementary principle that where receivers are wrongfully appointed and the appointment is not acquiesced in the property cannot be burdened with the cost of receivership.

Beach v. Macon Grocery Co., 125 Fed. 513.
Weston v. Watts, 45 Hun. (N. Y.) 219
Richmond v. Irons, 121 U. S. 27.
Wills Valley Mining Co. vs. Galloway, 155 Ala. 628.
Highly v. Deane, 168 Ill. 467.

Frence v. Gifford, 31 Iowa 428.
Wagner v. Railway, 233 Pa. 114.
Bellamy v. Telephone Co., 25 L. R. A. (N. S.) 412.
Powell v. City of Louisiana, 141 Fed. 960.
Harrington v. Union Oil Co., 144 Fed. 235.
Gluck & Beckers Receivers of Corporations (2d Ed.) par. 100.
Beach on Receivers (Alderson's 2d Ed.) par. 119.
In Re: Wentworth Lunch Co., 191 Fed. 821.

The case of Palmer v. Texas, 212 U. S. 118, does not militate against this well established rule. In that case not only was there an acquiescence in the appointment, but the receivers' expenses were ordered paid out of money they made in the operation of the receivership. The property was turned back to the owners without any burdens at all, and without any diminution in value. In other words, the owner's property that was wrongfully taken from it *was not burdened with one dollar of receivers' expenses.*

In the instant case the present situation of the property is admirably stated by adversary counsel in their *first* brief filed to sustain their objections to the granting of the Writ of Certiorari, which will be hereafter referred to. Of course the receivers have not funds with which to pay these expenses with which the property has been burdened.

III.

The Receivership has not Benefited the Corporation or Realized any Funds but has only Resulted in the Depreciation of the Corporation's Property.

It is true that the Master to whom the receivers' accounts were referred reported as follows:

> "4. The operation and conduct of this business under their receivership has resulted in benefit and profit to the stockholders and creditors to the amount of at least $49,008.41 as shown by Exhibit 1 of April 11, 1924, a copy of which is attached hereto." (R. 428).

The question, however, was not referred to the Master by the order of reference (R. 304) and his conclusion thereon is of no importance.

It is also true that this report, notwithstanding the exceptions filed thereto, was confirmed by the District Court and that Court's decree confirmed by the Circuit Court of Appeals in the decree now under review. Although the action of the Special Master was assigned for error in the Circuit Court of Appeals, that Court discussed only the fundamental underlying question. This appears from its opinion (R. 581):

> "The Corporation appealed assigning several errors, only one of which we shall discuss. This is error charged to the Court in allowing the administrative costs of the receivership in a case in which the Court had no jurisdiction to appoint receivers."

A comparatively brief reference to the Record will show the absolute unsupportability of this conclusion of the Special Master. Exhibit 1 referred to by him in the above quoted extract from his report is found at R. 429 and is a statement submitted by the accounting receivers. The first item is an alleged increase in

assets amounting to $12,525.80 as taken from the receivers' balance sheet. (R. 294). This sheet shows a comparison of assets and liabilities between the balance sheet dated May 11th, 1922, the date when the receivers were appointed, and January 30th, 1924, the date of the account. The comparison is made, however, not only with the balance sheet of the corporation, but also with a reconstructed balance sheet to suit the contentions advanced by the receivers in the course of the testimony contained in the first half of this Record.

In drawing this reconstructed balance sheet the receivers instructed their accountant to eliminate such items as they, without any evidence or any judicial authority, considered should be eliminated. (R. 387-390). A comparison of the balance sheet with the reconstructed sheet of May 11, 1922, shows an increase in liabilities of $61,335.44, and an increase in assets of $73,861.24 showing the net increase alleged to exist as above mentioned. This is reached only by the use of the reconstructed balance sheet of May 11, 1922, and will not be found if the balance sheet as kept by the corporation is used. (R. 394). All that the receivers did do was to increase the inventory by $9,-368.90, pay off a mortgage on an adjoining piece of vacant land amounting to $2,300.50, as against which notes and accounts payable were increased by $63,-272.49. It is true that the increase claimed shows an item of $55,070.32 of increase in machinery. This exists only by taking as the starting figure that given in the reconstructed balance sheet and not in the actual balance sheet, and moreover, largely represents the

amount expended for replacements in the course of operation by the receivers.

The next item alleged to constitute profits is auditing and investigation which is fully discussed on page 31 of our main brief.

The next item, "Bonds and Insurance," represents the amount disbursed by the receivers for premiums on their bonds, fire insurance on the buildings during part of the receivership, and various other kinds of insurance covering the operation of the plant.

The item of "Old Accounts Paid For" amounting to $7,920.15 is admittedly a benefit, as are the items of "Interest on Bonds," and "State of Delaware Tax," together amounting to $480.00. The item of "Legal and Professional Expenses" is fully discussed on page 32 of our main brief, with which the account payable to Delaware attorneys amounting to $4,000 should be assimilated. (R. 401, 371, 372).

The advertising items obviously are nothing but expenses incident to running the business which has now been discontinued for over four years. The item of "Custodians and Employees," May to July, represents simply the payroll for that period. How this statement is padded is obvious from the inclusion of the following two ridiculous items. In Accounts Payable, unpaid taxes for 1923, and in Bills Payable, the amount of royalty that would have been credited to Crossman's account. In support of the latter the receivers testified (R. 402) that they notified Mr. Crossman that they would not operate under his formula and would refuse to credit him with royalties

which theretofore had been credited to him on the corporation's books. He admitted that the question as to whether or not Mr. Crossman is nevertheless entitled to the royalties has not been judicially established. How can the fact that the receivers left the taxes for 1923 unpaid be a benefit conferred by them on the corporation?

We have seen that the balance sheets properly compared show a deficit rather than a surplus. The valid item of Old Accounts Paid Off is overcome by credits to the corporation. The most that can be said in favor of any of the other alleged benefits is that they are expenses of maintaining the plant. To maintain in statu quo is not to benefit.

The cases hereinbefore cited under point II establish the principle that against a benefit conferred by the receivership must be set off any deterioration of the property and the loss to the corporation by its deprivation of the use of its property.

Two outstanding considerations, however, more plainly than a detailed criticism of the receivers' accounts established the fact that the petitioner's property has not been benefited. First, is the present condition of the corporation's only asset, its factory property in Newark, N. J., which is well described on page 7 of the respondent's brief filed in this court October 27th, 1925, in opposition to the application for Certiorari:—

> "The plant located in Newark, N. J., which constitutes all the assets has been shut down for

some time. It is constructed of wood, is filled with machinery *and daily deteriorating in value.* Since the order made in December, 1924, which was appealed and affirmed and which it is now sought to review, an indebtedness of upwards of $4,500 has been created by the receivers for watchman's fees, taxes are accruing at the rate of approximately $4,000 a year. The property has been uninsured since January, 1924. Interest on the certificates of indebtedness is accruing at the rate of $1,500 per annum. The receivers have no fund to pay either taxes, watchman's fees or insurance."

Secondly, on top of this vacant, unprotected and deteriorated plant we have the receivers' indebtedness to raise which the order appealed from directs the property to be sold. This will be discussed in the next point.

IV.

It is not to Meet the Cost of Benefits Conferred by the Receivers that the Petitioner's Property is Ordered Sold.

The decree (R. p. 565) approves the disbursements shown in the receivers' account as a valid charge against the property; approves the indebtedness incurred by them as a valid lien upon the property; makes allowances to receivers, counsel and Special Master; directs that the property in default of the payment of the indebtedness and allowances by the corporation be sold by the corporation to raise the same. The figures are as follows:

Disbursements	$399,376.83	(R. 296)

INDEBTEDNESS

Accounts payable		27,292.32	(R. 298)
Receivers' certificates		25,000.00	(R. 430)
Receivers' allowances	$25,000		
Less already rec'd.	8,150	16,850.00	
Counsel fee		10,000.00	
Master fee		500.00	
Total charge on property to raise which it is to be sold		$ 79,642.32	

Not a single item of the receivers' indebtedness represents a benefit to the corporation. The following items of disbursements, however, have been beneficial to the corporation, (R. 429)

Mortgage reduced	$ 2,350.00
Interest on bonds paid	280.00
Delaware taxes paid	200.00
Real Estate Taxes paid	7,920.15
	$10,750.15

against which there had been received by the receivers moneys and inventory of the corporation not now represented by the property in their hands, totaling $9,852.98. Difference $897.17.

This is not really a net benefit because against it should be charged the tremendous deterioration of the buildings and enormous damage suffered by the com-

pany by not being able to transact business during a period of years including, it may be noted, two periods of coal strikes. This proposition is fully and excellently discussed by Judge Shelby in *Beach v. Macon Grocery Co. supra.*

V.

The First Decision of the Circuit Court of Appeals is Not Now Open to Question

Counsel for the respondents has cited no authority in support of his contention to the contrary. We refer to those cited on page 30 of our main brief.

The decree of the District Court under review was made after a final decree putting an end to the receivership. Conceding that were the case now here on certiorari to a final decree all prior interlocutory orders might be questioned, we feel that a review of proceedings under a mandate issuing upon the Circuit Court of Appeals' final decree does not open up the validity of that decree. The present respondents did not seek a review in this court of the first decree of the Circuit Court of Appeals. Now to say that that decree is erroneous and that this Court may revive the receivership is absurd. It is equivalent to saying that upon a review of proceedings in execution the validity of the judgment upon which the execution issued may be attacked.

VI.

The First Decree of the Circuit Court of Appeals Was Right.

This is not a suit by a local creditor who is asking the Court to apply the local property of the Corporation to meet its debts. We have here a fight between stockholders of a new going concern. On the side of the complainant were arrayed 54,550 shares of common stock owned by approximately 157 stockholders. On the other hand we have 487,647 shares of common stock owned by 32 persons. Excluding Mr. Crossman we still have on the defense 87,647 shares. We exclude on both sides any reference to preferred stock. The corporation is the sole defendant. No officer or director is made a party defendant nor is there any clause to satisfy Equity Rule 27. It is simply an effort by a dissatisfied minority to substitute the judgment of the Court and its receivers for the judgment of the board of directors and to have the Court through its receivers and by its orders manage the corporation, wind it up, marshal its assets and distribute them not only in effect but by the express request of the Prayer of the Bill and the orders of July 13th and December 22nd. The suit is under the New Jersey Corporation Act as supplemented and amended. The Court below, therefore asserted jurisdiction to take charge by an original bill and appoint receivers and through them wind up at the suit of a stockholder a foreign corporation insolvent. The question is, has the Court any such jurisdiction?

A

Independently of the Statute of New Jersey

It is very well settled that independently of a state statute, a federal court will not entertain a bill at the suit of a stockholder, against a foreign corporation, for the appointment of a receiver, to wind up its affairs and distribute its assets, even though the assets may be within its jurisdiction. *Maguire* vs. *Mortgage Co. of America, 203 Fed. 858 (C. C. A., 2, 1913).* This was a suit brought in this District Court of the United States for the Southern District of New York by a minority stockholder against a Delaware corporation. The District Court denied a motion to vacate an order appointing a receiver, but on appeal, the Circuit Court of Appeals reversed and remanded, with instructions to dismiss the bill for want of jurisdiction. Noyes, *J.*, said at page 858:

> "The present suit is by a minority stockholder charging that the assets of the defendant corporation are within the jurisdiction; that only its president has qualified as an officer and that lawsuits are threatened, and praying for the appointment of a receiver and 'that the assets of the company after the payment of its just debts be applied to the payment of such proportion which the stock of the plaintiff and other shareholders similarly situated are justly entitled to.' There is no averment of insolvency. The order involved in this appeal appoints a 'temporary receiver' but confers upon him the general powers of receivers.
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> * * * * * * *

But this is not the case of a domestic corporation. The defendant corporation exists under the laws of the State of Delaware and it is elementary that it is alone for the state which creates a corporation to provide for its dissolution and winding up. A federal court of equity has no jurisdiction over an original stockholder's suit against a foreign corporation for the appointment of a receiver to wind up its affairs and distribute its assets. Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; Sidway *v.* Missouri Land & Live Stock Co. (C. C.) 101 Fed. 481. See also cases *post.*

But it is urged that all the assets of the corporation are within this jurisdiction and that they may be wasted unless a receiver is appointed here. Well-established equity procedure provides for just such a situation. When a stockholder's suit has been brought in the courts of the state which created the corporation and a receiver has been appointed there, the federal courts in other states will protect property within their jurisdictions by the appointment of ancillary receivers. Parks *v.* U. S. Bankers' Corp. (C. C.) 140 Fed. 160; Haydock *v.* Fisheries Co. (C. C.) 156 Fed. 988; Hutchinson *v.* American Palace Car Co. (C. C.) 104 Fed. 182."

This case has frequently been cited with approval by other courts, including the Supreme Court of the United States in *Hartford Life Insurance Co.* v. *Ibs, 237 U. S. 662, at 671.*

Brictson Manufacturing Co. vs. *Close, 280 Fed. 297 (C. C. A., 8, 1922).* This suit was brought in the District of Nebraska, by stockholders of a South Dakota corporation alleging misconduct by the management

of the corporation, alleging that the corporation was insolvent, and praying for the appointment of a receiver. The bill alleged the appointment of a receiver was necessary to protect the company's assets, prevent waste and reckless extravagance, and to administer the company's affairs in an honest, business, and impartial manner, until such time as the stockholders might determine and assert their wishes as to whether the company should be liquidated or conducted under efficient management, or reorganized, or some other steps taken. The District Court appointed a receiver. The Circuit Court of Appeals reversed that order with directions that the receiver return all property in his hands; that he be thereupon discharged and the bill dismissed, with costs.

B

Under the Statute of New Jersey

The following sections of the New Jersey statute entitled "An Act Concerning Corporations (Revision of 1896)", as supplemented and amended, are material. Section 65, as amended by P. L. (1912), 535:

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for a writ of injunction and the appointment of a receiver or receiv-

ers or trustee or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application, and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order.

Section 66:

"The court of chancery, at the time of ordering said injunction, or at any time afterwards, may appoint a receiver or receivers or trustees for the creditors and stockholders of the corporation with full power and authority to demand, sue for, collect, receive and take into their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description of the corporation, and to institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation, and in his or their discretion

to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation, and in case of mutual dealings between the corporation and any person to allow just set-offs in favor of such person in all cases in which the same ought to be allowed according to law and equity; a debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the said estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the court of chancery; the word receiver as used in this act shall be construed to include receivers and trustees appointed as provided in this act."

Section 96:

"Foreign corporations doing business in this state shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations."

The extent to which Section 96 gives the courts of New Jersey power over foreign corporations doing business in this state, has been well defined by a long line of cases in the Court of Chancery and the Court of Errors and Appeals.

National Trust Company vs. *Miller, 33 N. J. Eq. 155* (Van Fleet, *V. C.*, 1880). This was a foreclosure suit

in which the receiver of the mortgagor, a foreign corporation, answered, attacking the mortgage as being in fraud of creditors. In discussing the power of the receiver of such foreign corporation, the Vice Chancellor said at page 159:

> "By express provision, foreign corporations, doing business in this state, are made subject to all the provisions of our statute concerning corporations, so far as the same can be applied to foreign corporations. Rev. 196 § 103. The design of this enactment seems to me to be very plain. The legislative design was, unquestionably, to confer upon this court the same powers, in respect to *insolvent* corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, *so far, at least, as the exercise of such powers was necessary to the recovery of any assets* whether legal or equitable, *which should go in discharge of debts.*" (Italics ours.)

Minchin vs. *Second National Bank, 36 N. J. Eq. 436* (Runyon, C., 1883). A bill was filed in the Court of Chancery by a creditor and stockholder of a New York corporation, against the corporation and two individual defendants. Such proceedings were had as resulted in a decree for an injunction, and the appointment of a receiver, under the then New Jersey Corporation Act. After the filing of the bill, and before the appointment of the receiver, the Second National Bank sued out an attachment against the corporation, under which a levy was made. After the appointment of a receiver, one of the individual defendants, the president of the corporation, caused the corporation's appearance to be entered in the attachment suit, there-

by, under the New Jersey Attachment Act creating a preference in favor of the plaintiff-in-attachment, and such creditors as had then come in as applying creditors. A bill was then brought by the same creditor and stockholder to enjoin proceedings under the attachment, to which a demurrer was filed. The Chancellor held:

1. That the complainant had no standing as the suit should be, if at all, maintained by the receiver.

2. Even if brought by the receiver, the suit would not be maintainable, because the corporation was a foreign corporation.

The Chancellor said at page 440:

> "But further, apart from this objection, the suit cannot be maintained on the merits of the case as presented by the bill, if it had been brought by the receiver. The act concerning corporations makes the remedies thereby provided in case of insolvency applicable to foreign corporations, so far as practicable. Its language is, that foreign corporations doing business in this state shall be subject to all provisions of the act, so far as they can be applied to such corporations. Rev. P. 196 § 103.
>
> Obviously, there are provisions of the act which cannot be applied to such corporations; for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more. A foreign corpora-

tion coming into this state and doing business here is indeed liable here on its contracts made here, but the question under consideration is not a question of liability to suit. It is a question of power over the property of the foreign corporation to administer it for the benefit of creditors and stockholders. As to the power of this court over the corporate existence or the exercise of its franchises, that has already been adverted to. The only question for consideration is, as to the character and extent of the power over the corporate property, for the purpose of administering it for the benefit of creditors or stockholders residing here. In the language of the New York Supreme Court, in De Bemer *v.* Drew, 57 Barb. 438, this court cannot regulate the internal affairs of foreign corporations, nor enforce any remedy beyond the limits of this state; it cannot annul or forfeit their charters, but it can and ought to provide for the collection of debts against them, when they or their property are brought within the jurisdiction of the courts of this state. The foreign corporation doing business here is subject to the provisions of our statute, so far as its property in this state is concerned. The proceeding is, practically, merely a proceeding in rem, and as such must be subject to prior liens, created by prior proceedings in attachment and the vigilant creditor who obtains such prior lien at law ought not to be, and cannot be, deprived of his advantage."

Jackson vs. *Hooper, 76 N. J. Eq. 185 (Howell, V. C., 1909).* The complainant and defendant were the sole persons beneficially interested in two foreign corporations, one English, and one an Illinois corporation. The bill alleged an agreement between the defendant and the complainant, by which the business of both corporations, and some other business was to be treat-

ed as a partnership. The bill alleged that the dummies on the board of directors of each of the two corporations were cooperating with the defendant to violate this agreement, and prayed, among other relief, an injunction to compel the performance on the partnership basis claimed. The Vice Chancellor held that there was no partnership, but that there was a joint adventure, and advised an injunction. On appeal, the Vice Chancellor was unanimously reversed, 76 N. J. Eq. 597. Dill, *J.*, for the Court said at page 597:

> "He granted an injunction which, although reciting that nothing therein should 'interfere or be deemed to interfere with the integrity or autonomy of the two corporations mentioned in the bill of complaint, to wit, Hooper and Jackson, Ltd., an English corporation, and the Encyclopaedia Brittannica Company, an Illinois corporation, or either of them, or to interfere with the business or property of either of said corporations, *except as herein specifically stated*' forthwith proceeds to enjoin the defendants, who, with the complainant, constitute the entire boards of directors of the English and Illinois corporations, from transferring any of the shares of stock therein, from withdrawing from the business of the complainant and Hooper or 'from any one of the bank accounts of the said business, in whatever name the same may be, any money or moneys for the private or personal use of the defendants * * * or otherwise than in the payment in the ordinary course of business', except that such defendants as are employes may receive their respective salaries. He further issued a mandatory injunction that the complainant and the defendant Horace E. Hooper may withdraw such sums for their private use as they may mutually agree upon, or in absence of an agreement between them, that each

may draw $5,000. per month; that either complainant or said Hooper shall have the right to sign checks for such amount, except that any debt of the business may be paid out of the funds thereof in whatever name standing."

at page 604:

"Finally, the court of chancery had no jurisdiction to issue the injunction in question. The court assumed to exercise visitorial powers over two foreign corporations which are not parties to this suit and to regulate the management of their internal affairs. The phrase 'internal affairs of a corporation' as here used, is well defined in the case of North State, &c., Mining Co. *vs.* Field, 64 Md. 151, as follows:

"Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president or other officer, and is the act of the corporation, whether acting in stockholders' meeting or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction."

The courts of this state do not possess such jurisdiction, and any suggestion of its assumption we emphatically repudiate.

"An injunction which enjoins the directors of a corporation as individuals, but with respect to corporate affairs, is an injunction against the corporation" (Italics ours).

at page 605:

> "It is unnecessary to analyze again the terms of the injunction in referring to its extraordinary scope and effect.
>
> In a form, sweeping, mandatory and embodying the ingenious theory of the complainant, the injunction, while purporting not to disturb or interfere with the integrity and autonomy of the foreign corporations, but only to enjoin the individuals from transferring property of an extensive business having its situs in foreign states, does, in fact, substance and effect, regulate and control the internal affairs of corporations chartered by foreign sovereignties and prevents freedom of action on the part of corporations not made parties to the suit, which we have held to be distinct legal entities and controlled by foreign laws. In violation of every obligation of official duty and responsibility imposed by law upon officers and directors, it substitutes the will of the chancellor for deliberate corporate action.
>
> Such assumption of power cannot be approved or tolerated without a complete destruction of equitable doctrine as applied to corporations, and a subversion of the law affecting corporate rights, duties and relations."

and at page 606:

> "We hold * * * that the whole subject-matter of the controversy relates to, and the injunction attempts to regulate, the management of the internal affairs of two foreign corporations; that the court of chancery has no jurisdiction to entertain the bill and that the injunction and all proceedings thereunder should be vacated and

held for naught."

Counsel for the respondent lays great emphasis upon the amendment of 1912. The following cases arose after that amendment:

McDermott vs. *Woodhouse*, *87 N. J. Eq. 124* (Backes, *V. C.*, 1916). This was a bill by the receiver appointed by the New Jersey Court of Chancery of an insolvent foreign corporation to recover from the defendant an unpaid stock subscription. The defendant moved to strike out the bill on the ground that the Court was without jurisdiction; that such proceedings could be taken only in the state in which the corporation was organized. This motion was denied, and the defendant appealed. The Court or Errors and Appeals unanimously reversed the Vice Chancellor, 87 N. J. Eq. 615. Swayze, *J.*, said for the Court, at page 616:

> "The bill is a most extraordinary one. It is a bill filed by a receiver in insolvency of a New York corporation, who was appointed by our court of chancery, and seeks to establish a stockholder's liability for stock issued for property purchased, as is said, at a gross overvaluation. We pass over the informal statements contained in the bill, and put upon it the best face possible.
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> * * * * * *
>
> We mention these difficulties because they are of so fundamental a character that we ought not to pass them unnoticed and thereby appear to justify what seems by the averments of the bill to have been an unwarranted interference by our

courts in the internal affairs of a foreign corporation. Probably the proceedings for a receiver were *ex parte*, and the attention of the court was never called to the fact that the corporation was not a New Jersey corporation. The matter is important. The bill seeks to do what can only be done by a receiver in case he possesses all the powers of a statutory receiver in insolvency, and shows on its face that the utmost powers he could have would be those of a mere ancillary receiver to gather in the assets in this state.

* * * * * *

Since this is the limit of the stockholder's obligation, it follows that the amount must be ascertained by a tribunal which has the power to ascertain the total amount of the debts and the total amount of the assets of the corporation. This cannot be done in a forum where only an ancillary receivership is possible. It must be done in the form of the domicile. The bill in the present case, indeed, sets up an attempt to compel creditors to bring in their claims and the entry of an order barring creditors in the insolvency suit. As far as we know, the only authority for such a proceeding is section 75 of the Corporation act (Comp. Stat. p. 1648); but this can only apply to a New Jersey corporation; our courts cannot force a New York corporation to submit his claim to our tribunals under penalty of losing all right to participate in the distribution of the assets. It is manifestly quite as necessary to ascertain the total assets of the corporation as its total liabilities in order to fix the amount needed to pay creditors, and these assets can only be finally ascertained in the courts of the domicile to which assets may be remitted by courts of other forums acting through ancillary receivers, as in Irwin *v.* Granite State Provident Association, 56 N. J. Eq. 244."

In Atwater vs. Baskerville, 89 N. J. Eq. 121 (Lane, V. C., 1918), relied on by counsel for the respondents, the foreign corporation was insolvent. The Vice Chancellor held that the Court of Chancery had jurisdiction to appoint a receiver of an insolvent corporation doing business in New Jersey, although no receiver had been appointed at the corporation's domicile, and that the relief prayed did not involve an interference with the internal affairs of such corporation. On appeal, he was affirmed by the Court of Errors (90 N. J. Eq. 275) in a brief opinion which said:

> "The order appealed from is affirmed. The opinion of the vice-chancellor sufficiently vindicates his result. We have only to add that McDermott *v.* Woodhouse did not hold anything to the contrary. It expressly recognized the power of our courts to gather in, and control the disposition of, the assets of a foreign corporation found within this state. Irwin *v.* Granite State Provident Association, 56 N. J. Eq. 244. It happened in the last-cited case that there was also a domiciliary receiver, but, obviously, that was not a condition precedent to the appointment of a receiver in this state to secure or preserve the assets."

It cannot be contended, therefore, that this case has any application to the case of a foreign corporation not insolvent.

Goff vs. *Goff Electric, etc., Co., 89 N. J. Eq. 258* (Leaming, *V. C.*, 1918). The decision of this very important case appears from the following passages from the opinion of the Vice Chancellor:

"The bill herein is filed by complainants as stockholders and creditors of the Goff Electro Pneumatic Brake Company, a corporation of the State of Delaware, and prays for an injunction restraining that corporation and its officers and agents from exercising any of its privileges or franchises or transacting its business, and for the appointment of a receiver of that corporation. The bill discloses corporate assets in this jurisdiction and charges not only neglect of duty upon the part of the officers and directors of the corporation, but also wrongful diversion of assets by them, and alleges that the business of the corporation is being conducted at a great loss and greatly prejudicial to the interests of its creditors and stockholders, and that its business cannot be continued with safety to the public and advantage to the stockholders.

* * * * * * *

The bill does not allege that defendant company is insolvent. It alleges that its assets are $18,000, of which $10,500 is cash, and its liabilities about $4,000. The allegation of danger of future insolvency is based upon the claim that nothing is being done to promote the interests of the company and no revenues are being received, while its expenses are $250 per month for salaries. The answer discloses as assets cash to the amount of $8,289.38, bills receivable of the nature of quick assets to the amount of $1,791.55, and the patents which were made the basis of the capitalization of the corporation, and denies that it has liabilities to the amount of $4,000; its total expenses are stated as $300 per month, including rent. It accordingly is clear that a condition of insolvency neither exists nor is presently threatened. In the adjudication of applications for the appointment of receivers of corporations, the court of chancery

of this state is required to observe certain well-defined limitations upon the exercise of that power. The statutory power found in our Corporation act has reference only to corporations which are actually or potentially insolvent. Section 96 of that act subjects foreign corporations doing business in this state to the provisions of the act, so far as they can be applied to foreign corporations; *accordingly in the appointment of receivers of foreign corporations that section can only be understood to contemplate insolvent foreign corporations.* And, as is pointed out in Minchin *v.* Second National Bank, 36 N. J. Eq. 436, there are provisions of the act relating to insolvent corporations which obviously cannot be applied to insolvent foreign corporations, since the court of chancery of this state cannot prevent a foreign corporation from exercising its franchises in another state. As there stated it can, under our statute, through the medium of a receivership, sequester the property in this state of an insolvent foreign corporation and administer it here for the benefit of creditors and stockholders but it can do but little more; thus the efficacy of the provisions of section 96 of our Corporation act, so far as it relates to receivers of foreign corporations, is confined to securing to creditors and stockholders, citizens of this state, a just proportion of the property in this state of foreign corporations when insolvent. See, also, Albert *v.* Clarendon Land Co., 53 N. J. Eq. 623. Whether under our statute a receiver of an insolvent foreign corporation may be appointed without an adjudication of insolvency first being made in the state of the domicile of the corporation, need not be here considered. See McDermott *v.* Woodhouse, 76 N. J. Eq. 615. It follows that any relief that may be herein awarded to complainant must emanate from the general powers of this court.

The recent case of Morse *v.* Metropolitan Steamship Co., 87 N. J. Eq. 217, reviews at some length the circumstances which may appropriately call into activity the general powers of a court of equity to appoint a receiver of a solvent domestic corporation. *But, as already stated, the present application is for the appointment of a receiver of a solvent corporation of another state and for an injunction restraining the corporation and its officers and directors from exercising any of its privileges or franchises. It is clear that the measure of relief here sought cannot be properly awarded,* even though the verified denials and affirmative averments of the answer be wholly disregarded. Not only is this court unable to enforce a decree of that nature out of this state, but such decree, could it be enforced, would clearly be operative to regulate the management of the internal affairs of a foreign corporation, since it would wholly deny to that corporation the exercise of its corporate functions. Jackson *v.* Hooper, 76 N. J. Eq. 592, 604. Nor does it seem that any lesser degree of relief can be here administered in behalf of complainants with due regard to the rule that a court should not take jurisdiction of the internal affairs of a foreign corporation."

Eckrode vs. *Endurance Tire, etc., Co.*, 90 N. J. Eq. 129. The decision of this case appears from the opinion of the Vice Chancellor, which is copied in full:

"This bill alleges that complainant is a resident of this state and the owner of five hundred shares of the common stock of the defendant, the Endurance Tire and Rubber Corporation of New York (a New York corporation authorized to do business in this state), transacting such business in the city of New Brunswick.

Complainant files his bill for the benefit of himself and all other stockholders of this corporation, and seeks to have a deed and bill of sale for the corporation's real and personal property in this state, made on December 5th, 1918, by this corporation to the defendant, the Hardman Rubber Corporation (a corporation of the State of Delaware, also authorized to do business in this state), declared illegal and void; and also seeks to have declared illegal and void a certain mortgage of like date, covering the property so transferred and conveyed, made by the Hardman Rubber Corporation to Arthur W. Rinke, as trustee, to secure an issue of bonds amounting to $210,000, claimed to have been given in exchange, or as a consideration for the deed and bill of sale. And the bill also asks for the appointment of a receiver for the Endurance Tire and Rubber Corporation on the allegation that it was unable to meet its obligations and was insolvent at the time of the conveyance and transfer of its property.

The attack upon the sale and transfer of the property rests upon the claim that the action of the Endurance Tire and Rubber Corporation in making the same *ultra vires*, and this contention is based upon the allegations (1) that such sale and transfer was not sanctioned by the consent of ninety-five per cent. of the capital stock of the Endurance Tire and Rubber Corporation, as required by section 16 of the Stock Corporation law of the State of New York (Com. L. of 1909, ch. 61), as complainant, who is the owner of more than five per cent. of such capital stock, did not consent to such sale; (2) that notice of the meeting of the stockholders at which the resolution authorizing the sale was adopted was not given as required by sections 16 and 25 of the Stock Corporation law of New York, and (3) that the corporation being unable to meet its obligations could

not, under section 66 of this law, transfer any of its property to any of its officers, directors or stockholders * * * except for the full value of the property paid in cash; but there is no allegation that the Hardman Rubber Corporation comes within this prohibition.

The bill further alleges that the conveyance and transfer includes all the real estate and tangible personal property owned by the Endurance corporation, and that both this real and personal property are located in this state.

Complainant invokes this court's jurisdiction on the ground that he is a resident of the state and that the property in question is located therein; and defendants contend that the court is without jurisdiction as the controversy is between a stockholder and the corporation and its directors, and relates to the internal affairs of a foreign corporation.

Chancellor Runyon, in Gregory *v.* Railroad Co., 40 N. J. Eq. 38, remarked that it is obvious that this court cannot regulate the internal affairs of foreign corporations; and in the latter case of Jackson *v.* Hooper *et al.*, 76 N. J. Eq. 592, the court of errors and appeals hold to the same effect, and adopt the definition of the phrase 'internal affairs of a corporation' given in the case of North State, &c. Mining Co. *v.* Field, 64 Md. 151, where it was held that—

'When the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meetings or through its agents, the

board of directors, then such action is the management of the internal affairs of the corporation, and in case of a foreign corporation our courts will not take jurisdiction.'

The bill does not charge the officers or directors of either of the corporations with any fraudulent conduct; and it appears that the corporate acts complained of affect complainant solely in his capacity as a member-stockholder of one of the corporations, and that individually he has no relation to either of them independent of his relationship as a stockholder in the Endurance Tire and Rubber Company. Applying to this situation the definition of the phrase 'internal affairs of a corporation', approved in Jackson *v.* Hooper, *supra*, and the tests quoted from 12 Rul. Cas. L. § § 20, &c. by Vice-Chancellor Lane in Atwater *v.* Baskerville, 89 N. J. Eq. 121, it is clear that the mere fact that complainant is a resident of this state, and that the property to which the corporate action relates is situate therein, are not in themselves sufficient to justify this court in assuming jurisdiction.

The allegation of the insolvency of the Endurance Tire and Rubber Company is too general to warrant the appointment of a receiver, assuming this court has the authority to appoint a receiver for a foreign corporation (Atwater *v.* Baskerville, *supra*); and as there are no other facts in the case that will justify the court in assuming jurisdiction, I will advise that the bill be dismissed."

The complainant appealed, and the Court of Errors and Appeals, affirmed Vice Chancellor Foster, on his opinion, 91 N. J. Eq. 153.

The conclusions to be drawn from the foregoing line of cases are very plain:

1. At least at the suit of a New Jersey creditor, the Court of Chancery will appoint a receiver, pursuant to Section 96 of the New Jersey Corporation Act, for an insolvent foreign corporation doing business, and having property in New Jersey, whether or not a receiver has been appointed in the state under the laws of which the corporation exists.

2. The Court will not appoint a receiver at the suit of a stockholder of a foreign corporation which is not insolvent.

3. The Court will not, and is without jurisdiction, either by the appointment of a receiver, or by injunctive decree, to interfere with the internal affairs of a foreign corporation.

Do not these decisions fully sustain the first decision of the Circuit Court of Appeals?

A reading of the powers given to the receivers in the order of July 13th (R. 252) will show an almost verbatim copy of Section 66. The last paragraph of the order of December 22nd (R. 254) expressly refers to the New Jersey statute. Consider, for a moment, the effect of this statutory injunction, and statutory receivership, upon the internal affairs of a New Jersey corporation. The corporation, its officers and agents, are enjoined from exercising, any time or anywhere, any of the franchises of the corporation. Its directors

cannot meet; its stockholders cannot meet; the corporation cannot, without violating the injunction, perform any of the corporate acts, which it is expressly authorized to perform by the laws of Delaware, to which it owes its existence. No more sweeping injunction is issued under the statute by the New Jersey Court of Chancery against a New Jersey corporation, and no more thorough-going control is exercised by the New Jersey Court over a New Jersey corporation, by the issuing of the injunction and appointment of a receiver, than has been done in the case at bar. Such an exercise of control, not limited to the assets within the State of New Jersey, or to corporate action within that state, certainly interferes with the internal affairs of the defendant.

Indeed, any bill by a stockholder complaining of the management of the corporation by its officers and directors, and seeking to have that management corrected by a receiver of the court, and by the court acting directly through its injunctive decrees, necessarily interferes with the internal affairs of the corporation. The conduct of the corporation's business, the making of contracts by its officers and directors, the issuing of stock for this purpose, and that purpose, are all the internal affairs of the corporation. The complainant complains of all such matters in this case, and has persuaded the court below, by its receivers, and by its injunction decrees, to interfere with those matters. A clearer case of the interference in the internal affairs of a foreign corporation could not be imagined. The case is well within the definition of internal interference laid down by the New Jersey Courts in *Jackson* vs. *Hooper* and *Eckrode* vs. *Endur-*

ance, etc., Corporation of New York, supra. The New Jersey courts, under the authority of those two cases, and the other cases, hereinabove cited, would surely hold that they had no jurisdiction to make the decrees, or appoint the receivers, as has been done by the court below. For that reason, the court below was without jurisdiction.

Independently of the interference with the internal affairs, it is the established doctrine of the New Jersey courts that they will not appoint a receiver for a *solvent* foreign corporation. *Goff* vs. *Goff, etc., Co., supra.* The decrees in the case at bar are careful in adjudging that the defendant is not insolvent. On that ground, also, the state courts are without jurisdiction.

There is, therefore, nothing in the law of New Jersey, which gives the court below the power or jurisdiction it purported to exercise. It follows, therefore, necessarily, that this court should reverse the decree appealed from, with directions to discharge the receivers, and dismiss the bill.

Wherefore, it is respectfully submitted that the decree under review must be reversed.

JAMES J. LYNCH,
GEORGE W. C. MCCARTER,
Counsel for Petitioners.

RESPONDENT'S

BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 227.

BURNRITE COAL BRIQUETTE COMPANY,
Petitioner,

and

EDWARD G. RIGGS, ALFRED L. KIRBY and JOHN P. DUFFY, as Receivers of Burnrite Coal Briquette Company,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS.

MERRITT LANE,
Of Counsel with Respondents.

JOSEPH L. SMITH,
Of Counsel.

Arthur W. Cross, Law Printer, 58-67 Lafayette Street, Newark, N. J.

SUBJECT INDEX AND INDEX OF ARGUMENT.

ALPHABETICAL LIST OF CASES CITED.

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IN THE

Supreme Court of the United States

October Term, 1926.

No. 227.

BURNRITE COAL BRIQUETTE COMPANY, a corporation, *Petitioner,* *and* EDWARD G. RIGGS and ALFRED L. KIRBY and JOHN P. DUFFY, as receivers of Burnrite Coal Briquette Company, *Respondents.*	*On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.*

BRIEF FOR RESPONDENTS.

(Italics, etc., except where otherwise noted are ours.)

STATEMENT OF THE CASE.

A. History of Proceedings.

Burnrite Coal Briquette Company was a corporation of Delaware with all its property and assets within New Jersey. It had some 4,500 stockholders, scattered throughout the United States. Its president was Francis M. Crossman, who has been charged, throughout these proceedings, with having manipulated the corporate business for his own benefit, and against the interests of stockholders and creditors. These charges have not been successfully denied nor was the decree of the District Court made on the 13th of July, 1922 (p. 252) adjudicating that "the business of the defendant corpo-

ration has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors and stockholders, and that the business cannot be conducted with safety to the public and advantage to the stockholders" (p. 252) disturbed upon any issue of fact.

On May 11, 1922, a stockholder, resident of New Jersey, filed a bill in the District Court for the District of New Jersey, against the company, which bill alleged, within the meaning of section 65 of the Corporation Act of New Jersey, 2 C. S. of N. J., page 1640, which reads as follows:

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the court of chancery for a writ of injunction and the appointment of a receiver or receivers or trustees, and the court being satisfied by affidavit or otherwise of the sufficiency of said application and of the truth of the allegations contained in the petition or bill, and upon such notice, if any, as the court by order may direct, may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered on behalf of the parties, and if upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter with safety to the public and advantage to the stockholders, it may issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts, or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order."

that the company was insolvent (paragraphs 6, 7, 8, 9, 10 and 11; *Wright* v. *American Finance and Securities Co.*,

85 N. J. E. 181, 183), and that the business had been conducted at great loss, etc.

It set forth *two* grounds for the appointment of a receiver under the statute. It also appealed to the general jurisdiction of the Federal Court, in equity, independent of any statute. *Scattergood* v. *American Pipe and Construction Co.*, 249 Federal 23; *Morse* v. *Metropolitan Steamship Co.*, 87 N. J. E. 217, affirmed 88 N. J. E. 325; *in re N. J. Refrigerating Co.*, 95 N. J. Eq. 215, at 221.

Upon the filing of the bill, May 11, 1922, an order was made appointing temporary receivers (p. 19), giving them power to continue the business, incur indebtedness, issue receivers' certificates and calling upon the corporation to show cause at a later day why the receivership should not be continued.

On May 18, 1922, the corporation filed a petition (p. 23) alleging its solvency, and praying for a modification of the order. No question was raised as to the jurisdiction of the court. On the filing of that petition an order to show cause was made (p. 40), and the powers of the receivers were, to some extent, restricted as to the examination of books and records of the company.

On May 29, 1922 (p. 68) this restriction was lifted.

On June 5, 1922, the corporation filed its answer (p. 69), in which it set up that it was not insolvent and that its business was not being conducted at great loss, etc., thereby *denying the facts stated in the bill.*

It raised no question of the jurisdiction of the court except by the third paragraph (p. 69), in which it denied the jurisdiction of the court "because neither the complainant nor the defendant is a citizen or resident of the State of New Jersey." This was intended to invoke section 51 of the Judicial Code. That objection had been

waived by the filing of the petition to vacate the order of May 11, 1922.

> *Pusey & Jones Co.* v. *Hans Karluf Hanssen*, 261 U. S. 491, 67 L. Ed. 763.

And counsel on the argument upon the return of the order to show cause in his brief, expressly waived it.

After the argument the District Judge filed a memorandum (p. 249). He found, as a fact, that the business had been and was being conducted at a great loss and greatly prejudicial to the interests of its creditors and stockholders, and that further prosecution of business by it would tend to the sacrifice, injury and depreciation of its assets and the rights of stockholders and creditors.

In the argument counsel for the corporation had insisted that the court could not, on a summary hearing, appoint permanent receivers as the Court of Chancery might have done under the provisions of the New Jersey statute. The court, therefore, continued the temporary receivers pending the further hearing of the cause.

On July 13, 1922, an order was made which continued the receivers with all the powers granted by their order of appointment of May 11, 1922, including power to continue the business.

From the proofs before the court at the time of the making of this order it also appeared that the corporation was hopelessly insolvent.

With respect to the power of the court to, on final hearing, appoint a receiver upon the ground that the business of the corporation had been and was being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders, etc., counsel for the corporation, who had been a member of the Circuit Court of Appeals, Mr. Haight, said:

> "There is a decided difference between a corporation which has become insolvent and one which

is not insolvent but whose business has been carried on at a loss. A Federal Court has, therefore, no right to appoint a receiver of a corporation whose business is simply being carried on at a loss, but which is not insolvent, unless it be by virtue of the New Jersey statute. The first question that presents itself on this branch of the case is, therefore, whether a Federal Court, sitting in New Jersey, may execute that provision of the New Jersey statute, except, of course, by consent. Although opposed to the interests which we represent in this case, frankness compels us to take the position that at a proper time, *i. e., upon final hearing, a Federal Court may execute such a right, because it is one essentially equitable in its nature and is, in reality, but an enlargement of the general right which has always been exercised to, on the application of a proper party, wind up the affairs and administer the property of an insolvent corporation.*"

No appeal was taken from this order.

On December 22, 1922, the final hearing came on. There was no argument. The case was submitted upon the record made upon the hearing upon the preliminary application. Thereupon, the District Court made a decree (p. 254) by which it adjudged—

"that the affairs of said corporation have been grossly mismanaged by the president and by the board of directors, and that the control of a majority of the voting stock of said company is in the officers and directors who have been mismanaging the said corporation, and, that, within the meaning of an act of the State of New Jersey entitled, 'An act concerning corporations,' revision of 1896, and its amendments and supplements, the business of the corporation has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors and stockholders, so that its business cannot be conducted with safety to the public and advantage to the stockholders under the present

management, and that, for the reasons aforesaid, the receivership herein established should be continued."

It was further adjudged that "said corporation is not insolvent."

B. As the record shows the corporation was, in fact, insolvent.

The corporation had been manipulated throughout for the benefit of Crossman alone. He received a controlling interest in the company for a formula which has not been used. Notwithstanding that he received a controlling interest for a formula neither the corporation nor its subsidiaries or licensees can manufacture anything without paying him a royalty. The corporation parted with its right to manufacture in Perth Amboy to a New Jersey corporation and got in exchange one-half of the capital stock of the New Jersey corporation and an agreement of the New Jersey corporation to pay royalties *to Crossman*. This New Jersey corporation had no assets except its right to manufacture under the licenses of the defendant and its contract to purchase a plot of ground for $100,000 from Crossman for which he had paid $68,000. At the date of the appointment of the receivers Crossman contemplated the corporation entering into a contract with a common law trust of Pennsylvania under the terms of which defendant corporation would part with its right to manufacture in the States of New York, New Jersey, Maryland, Pennsylvania and Massachusetts for one-tenth of the capital stock of this common law trust, and an agreement upon the part of the common law trust to pay royalties *to Crossman*. The stock of the company sold netted to the company seventy or eighty cents, whereas it had been sold on the market, through the Burnrite Coal sustain the allegations of the bill, and that the District share. The company, three months before the receiver-

ship, encumbered its property with a $100,000 mortgage to secure an issue of bonds and Crossman and his wife and the Shamokin Valley Sales Corporation, owned by Crossman, and the Burnrite Coal Service Corporation held $48,600 of the bonds to secure alleged debts due to them of $36,415.90. Only 5,000 of these bonds were sold, although Crossman said that the purposes of the bond issue was to raise money to pay *current expenses*. The coal dust was furnished by Burnrite Coal Service Corporation at an exorbitant price and that corporation was owned by a half-brother of Crossman. Notwithstanding the agreement to accept royalties in lieu of salaries Crossman's board of directors voted him 10,000 shares of stock for services rendered and the directors voted themselves an equal or greater amount of stock. And lastly the president of the company, Crossman, in these proceedings made false and misleading statements.

The worthless securities of the Burnrite Coal Briquette Company of New Jersey had been used for the purpose of paying dividends upon the preferred stock of the Burnrite Coal Briquette Company, the present defendant, although that company never made a dollar, for the purpose apparently of stimulating stock sales.

The proofs showed actual insolvency.

On the date of the appointment of the receivers the cash balance of the corporation was $138.75 (p. 42). There was not sufficient moneys to meet the payroll which the defendant company had incurred prior to the appointment (p. 42). Creditors had been demanding payment (p. 42). It was not possible to operate without repairs (p. 43). A foreclosure upon part of the company's property was under way and there was no money to pay the mortgage (p. 44). The business of the company had been suspended (p. 42). The company was not able to meet its current obligations (p. 54). The property was not covered with insurance except to the extent of $10,000. The prem-

iums on the liability insurance and payroll insurance had not been paid and the insurance was about to be cancelled (p. 107). It would cost at least $10,000 to put the plant in first-class condition (p. 109). The company was not meeting its obligations as they fell due and it was not financially able to meet the obligations as most of the accounts set up on the books were uncollectible (p. 110). Crossman says (p. 119) that if receivers were placed in charge of the property, "I being the principal creditor, will be forced to take action, much against my will, the direct result of which will be to deprive the other stockholders of the company of their equity therein." And again he says (p. 129): "As I and my wife are the principal creditors, the only effect of forcing this company into receivership and liquidation will be to wipe out the stockholders other than myself, on account of the fact that I am secured by a mortgage on the property for my advances."

Rodemann, an affiant produced by Crossman, who is the treasurer of the company (p. 146) says: "The company has not been, up until the present time, in a position to manufacture profitably," and he then shows why, as he says.

The current liabilities amounted to $56,165.65, of which $28,309.22 represented notes payable and $19,086.77 accounts payable, and there was no money on hand to meet these accounts, nor was there any source from which money could be raised.

The company had been conducted at a great loss. During the year 1920 the loss was approximately $70,000; for the year 1921 approximately $90,000; from January 1, 1922, to May 11, 1922, $14,000. It is true that in the loss for 1921 there is figured a depreciation of approximately $47,000, but the proofs show that this is a comparatively small amount to allow for depreciation in a business of this kind. It was sought to explain these losses

by showing that the plant, during a part of the time, had not been in operation, but at a meeting of the board of directors held February 21, 1920, Crossman stated that the plant would be ready for operation March 6, 1920, and the records of the company show that the plant was actually in operation during the year 1920, and the production from May 1, 1920, to December 31, 1920, was 20,954 tons of briquettes. It is evident, therefore, that the plant was not in process of construction during the year 1921 (p. 237).

There have been carried among the assets of the company such items as moneys paid out in commissions (p. 238).

Notwithstanding these losses the company, for stock jobbing purposes, declared dividends upon its preferred stock upon two occasions.

Against its liabilities, inclusive of stock of $1,716,982.69, it had assets of all kinds which, according to Crossman, might be worth $335,000 (see petition, p. 24), and these were its only assets. And in the assets he included accounts receivable which were of doubtful or of no value, and the value placed by Crossman upon the fixed assets was grossly extravagant. Approximately, the value of the total assets had been paid out by way of commissions and discounts upon the sale of stock.

The operation has been a stock jobbing scheme and the stock has been outrageously manipulated. (See report of sales prices, p. 95.)

From the final decree an appeal was taken, (Assignment of Errors filed January 8, 1923, p. 256.)

In the assignment (1 and 4, p. 256), the statement is made that the court erred in taking jurisdiction but this must refer to the question of venue, which had been waived, for no other point of jurisdiction had been mooted below.

On the argument of this appeal counsel for the corporation took the position that the District Court for New Jersey had no jurisdiction to appoint a receiver of a corporation foreign to New Jersey upon the ground that its business had been conducted at great loss, etc. This was an about face from the position taken by counsel for the corporation upon the hearing upon the original order to show cause, which had resulted in the order of July 13, 1922, at which time counsel expressly conceded the jurisdiction of the court, on final hearing, to appoint a receiver under this provision of the statute.

C. Continuation of history of proceedings.

On August 11, 1923, the Circuit Court of Appeals, in an opinion by Buffington, Circuit Judge, held that the District Court for New Jersey had no power to appoint a receiver under this provision of the statute because the Court of Chancery of New Jersey had no such power and in that opinion (p. 263) it said:

> "The case will, therefore, be remanded to the court below with instructions to dismiss the bill upon the ground that the company in question being a foreign solvent corporation the court below had no jurisdiction to appoint receivers."

The Circuit Court of Appeals did not consider the question as to whether the corporation was, in fact, insolvent, which was charged in the bill, nor did it consider the power of the District Court, under its general equity jurisdiction, which was relied upon in the bill. It seemed to consider that it was bound by the adjudication of the District Court that the corporation was not insolvent, notwithstanding the fact that, under the general rule in equity appeals decrees should be affirmed if *for any reason* they be correct.

McAndrews & Forbes Co. v. *Camden*, 78 N. J. E. 244, at p. 247.

The adjudication of the District Court that the corporation was not insolvent was not binding upon the Circuit Court of Appeals.

Westerman v. *Dispatch Printing Co.*, 233 Fed. 609;

American Rotary Valve Co. v. *Moorehead*, 226 Fed. 202;

Presidio Mining Co. v. *Overton*, 270 Fed. 388.

Upon the coming down of the mandate the District Court requested advice from the Circuit Court of Appeals as to the form of the decree. The matter was heard before the Circuit Court of Appeals on December 3, 1923, (p. 268). On January 17, 1924, the Circuit Court of Appeals held that it was without authority to advise the District Court (p. 270). On January 21, 1924, the District Court filed an opinion (p. 276). On January 24, 1924, on that opinion (p. 279) an order was made directing the receivers to account, reserving all further equity until the coming in of the account and exceptions thereto.

From this order, which, in effect, denied the application of the corporation for an immediate decree of dismissal, no appeal was taken nor was mandamus applied for.

On February 7, 1924, the receivers filed their account (p. 280). On February 14, 1924, exceptions were filed thereto (p. 300). On February 21, 1924, the account was referred, *on motion of the solicitor of the corporation*, to a special master to examine. Considerable testimony was taken and on July 16, 1924, he reported (p. 423) approving the account. To this report exceptions were filed (p. 551). On December 19, 1924, a decree was made (p. 565) affirming the account, fixing the receivers' fees and fees for counsel, impressing the indebtedness of the receivers upon the property of the corporation in their control and directing the corporation to pay this indebtedness, and provid-

ing that upon such payment being made the bill be dismissed, and that, if the indebtedness be not paid, application might be made to sell the property to raise and pay the receivers' indebtedness.

From that order an appeal was taken to the Circuit Court of Appeals.

On June 27, 1925, the Circuit Court of Appeals delivered an opinion, the effect of which was to affirm the order of December 19, 1924 (p. 580).

It is to that decision that certiorari was allowed by this Court.

In his Point V of the brief in this Court counsel (p. 31) for petitioner questions the allowances, etc.

After the accounting the accuracy of the account was conceded, and the amount of allowances was expressly conceded to be reasonable. It is so stated in the decree (p. 565). By an order made January 5, 1924, amending the decree (p. 567) there was added a clause which had the effect of reserving to the corporation its contention that no charges whatever, growing out of the receivership, should be made a lien upon its property. Assuming power, the propriety of the charges and of the allowances to receivers and counsel was expressly conceded both in the District Court and in the Circuit Court of Appeals upon argument and it was also conceded that all of the charges stand upon a similar footing.

The sole question raised was whether the court had the power, under the circumstances of this case, to charge against the property of the corporation under the control of the receivers *any* (except taxes, insurance and interest on bonds) expenses of the receivership, and that is the only question which is here upon petitioner's application.

During all of the time that this litigation has been proceeding the receivers have been in charge, operating the business a part of the time, incurring indebtedness and

making disbursements under the terms of the order of July 13, 1922, (p. 252) which continued the receivership established by the order of May 11, 1922, from neither of which orders was an appeal taken, although permitted by statute, nor was any motion made to lift the receivership from an order denying which an appeal might have been taken.

ARGUMENT.

I.

THE PROPERTY OF THE DEFENDANT CORPORATION WAS NOT SEIZED BY A COURT HAVING NO JURISDICTION TO APPOINT RECEIVERS.

This is in answer to Point I of petitioner's brief (p. 11).

The receivers have always been in possession of the property under the order of May 11, 1922, continued by that of July 13, 1922. The order of December 22, 1922, (p. 254) which was the only order appealed from, never became effective because an appeal was taken on January 8, 1923, and, on August 11, 1923, it was reversed.

The result is that during all the course of this litigation the receivers have been in possession under orders which gave them power to operate the business and incur indebtedness, which were not appealed from.

A. Assuming the decree of the Circuit Court of Appeals reversing the decree of the District Court appointing Receivers, to be correct, the question was not one of jurisdiction.

While the opinion of the Circuit Court of Appeals, resulting in the reversal of the District Court (p. 263), states "the company in question being a solvent foreign

corporation, the court below had no jurisdiction to appoint receivers," the effect of that opinion is not that the court had no power, *upon the filing of the bill* and the hearing on the order to show cause, to appoint temporary receivers with the powers conferred upon them by the orders of May 11, 1922 and July 13, 1922.

It is conceded that the District Court has power to appoint a receiver of a foreign corporation upon the ground of insolvency. *The bill charged that the defendant was insolvent.*

Even under the decision of the Circuit Court of Appeals the court had clear authority to entertain the bill. True, section 51 of the Judicial Code might have been invoked by the defendant but this was a personal privilege which might be waived and was not only waived by the failure to appear specially but expressly waived by counsel on the argument on the return of the order to show cause. That point of jurisdiction, therefore, is out of the case.

The proofs before the court (much coming from the books, the examination of which the corporation sought to stop), upon the return of the order to show cause, showed a condition of insolvency.

On the date of the original appointment of the receivers the cash balance of the corporation was $138.75 (p. 75); there was not sufficient money to meet the pay roll which the company had incurred prior to the appointment (p. 110); creditors had been demanding payment (p. 110); it was not possible to operate without repairs (pp. 109-51); a foreclosure upon part of the company's property was under way and there was no money to pay the mortgage (p. 83); the business had been suspended (p. 109); the company was not able to meet its current obligations (p. 110); the property was not covered with insurance except to the extent of $10,000; the premiums upon the liability

and pay roll insurance had not been paid and the insurance was about to be cancelled; it would cost at least $10,000 to put the plant in first-class condition; the company was not meeting its obligations as they fell due, and it was not financially able to meet them as most of the accounts standing upon the books were uncollectible (pp. 109-56).

Crossman, the president, says (p. 119) that if receivers were placed in charge of the property "I being the principal creditor, will be forced to take action, much against my will, the direct result of which will be to deprive the other stockholders of the company of their equity therein," and again, he says:

> "As I and my wife are the principal creditors, the only effect of forcing this company into receivership and liquidation will be to wipe out the stockholders other than myself, on account of the fact that I am secured by a mortgage on the property for my advances."

Rodeman, an affiant produced by Crossman, who was the treasurer of the company (p. 146) says, "The company has not been, up until the present time, in a position to manufacture profitably."

The current liabilities amounted to $56,165.65, of which $28,309.22 represented notes payable and $19,086.77 accounts payable, and there was no money to meet these accounts, nor was there any source from which money could be raised.

Immediately after the order of July 13, 1922, instead of appealing, *Crossman had the directors pass a resolution consenting to an adjudication in bankruptcy and upon that resolution bankruptcy proceedings were initiated in Delaware.*

The company had been conducted at a great loss; during the year 1920 the loss was approximately $70,000; for the year 1921 approximately $90,000; from January 1,

1922, to May 11, 1922, $14,000 (p. 110); the operation of the corporation had been a stock jobbing scheme and the stock had been outrageously manipulated. (See report of sales prices pp. 96-104.)

This describes a condition of insolvency under the New Jersey statute.

> *Wright* v. *American Finance and Securities Co.*, 85 N. J. E. 181, 193, Court of Errors and Appeals;
>
> *Fort Wayne Electric Corporation* v. *Franklin Electric Light Co.*, 57 N. J. E. 7;
>
> *Reinhardt* v. *Inter-State Telephone Co.*, 71 N. J. E. 70;
>
> *Catlin* v. *Vichachi Mining Co.*, 73 N. J. E. 286;
>
> *Trust Co.* v. *Trustees of Wm. F. Fisher & Co.*, 67 N. J. E. 602.

The District Court did not, by the order of July 13th, adjudicate that the corporation was not insolvent. Counsel for the corporation had taken the position that, notwithstanding the provision for summary hearing under the New Jersey statute, the Federal Court could not appoint *permanent* receivers until final hearing, and the court yielded to that insistence, and by the order of July 13, 1922, continued the receivers pending the final determination of the cause and the further order of the court.

It is true that when the final hearing came on the court, by its order of December 22 (p. 254), adjudged that "the said corporation is not insolvent."

But when the court so adjudged it must have had in mind the meaning of the term "insolvent" as used by the bankruptcy act. It could not have had in mind the meaning of "insolvent" under the Corporation Act of New Jersey because it clearly appeared, from the proofs, that the corporation *was* insolvent in that sense.

If insolvent in the sense of the New Jersey Corporation Act, then the court had undoubted power to appoint receivers although the corporation was foreign to the State. This is conceded by the Circuit Court of Appeals, and the following cases are applicable:

> *Albert* v. *Clarendon Land and Investment Agency Co.*, 53 N. J. E. 623;
>
> *National Trust Co.* v. *Miller*, 33 N. J. E. 155, 159;
>
> *Irwin* v. *Granite State Provident Association*, 56 N. J. E. 244;
>
> *Atwater* v. *Baskerville*, 89 N. J. E. 121 (V.-C. Lane) affirmed 90 N. J. E. 275.

Irrespective as to whether the court on December 22, 1922, found insolvency it had full jurisdiction to appoint temporary receivers to conserve the property pending the hearing, the bill expressly alleging insolvency.

> "It is the initial pleading rather than the facts as they afterwards develop which determine the authority of the court to hear the cause."

15 *Corpus Juris*, title "Courts," section 169:

> "The court has judicial power to hear and determine the question of its own jurisdiction; it is not bound to dismiss the suit on a mere allegation but may inquire into the correctness of a averment. So it may receive testimony on a preliminary question to determine its jurisdiction."

15 *Corpus Juris*, title "Courts," section 170, page 851.

This court in *Moore* v. *New York Cotton Exchange*, decided April 12, 1926, 270 U. S. Supreme Court Reports, p. 593, 70 L. Ed., p. 750 at p. 756, said:

> "We do not understand that the dismissal was for the reason that there was any absence of jurisdiction to entertain the bill. What the court held was that the facts alleged were insufficient to establish a case under the Anti-Trust Act. Whether the

objection that a bill of complaint does not state a case within the terms of a Federal statute challenges the jurisdiction or goes only to the merits, is not always easy to determine. The question has been recently reviewed at some length by this court in Binderup *v.* Pathe Exchange, 263 U. S. 291, 305, 68 L. Ed. 308, 314, 44 Sup. Ct. Rep. 96, and the distinction pointed out as follows:

> 'Jurisdiction is the power to decide a justifiable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it.' Jurisdiction, as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous or, in other words, is plainly without color of merit. (Citing cases.) In that event the claim of Federal right under the statute is a mere pretense and, in effect, is no claim at all."

Assuming therefore that the decision of the Circuit Court of Appeals in reversing the final decree of the District Court appointing receivers was right, the reversal was not upon the ground of lack of jurisdiction but because the facts did not warrant the relief prayed for in the bill.

Having jurisdiction to determine the facts the court may, in the meantime, protect the property by the appointment of receivers.

> "Courts of chancery as well as other courts in the various states which exercise a general jurisdiction

> in equity and the judges thereof * * * have inherent jurisdiction to appoint receivers."

34 *Cyc.* 101.

The purpose is to protect the *res pendente lite* and there is no determination on the merits.

High on Receivers, sections 4 and 7.

This case is strictly analogous to *Greenbaum* v. *Lafayette & Broad Realty Corporation, et al.*, 97 N. J. Eq. 536. In that case a bill was filed in the Court of Chancery of New Jersey for the appointment of a receiver of a corporation alleging insolvency. The order appointing the receiver was reversed by the Court of Errors and Appeals upon the ground that, at the time of the application, the corporation *was in a solvent condition*, and free from any criticism of financial instability, which, under the Corporation Act, could subject it to legal or equitable animadversion.

Upon the remittitur coming down the court directed the receiver to file his accounts. The court allowed the receiver compensation and directed the expenses of the receivership to be paid out of the estate. From that order an appeal was taken.

The Court of Errors and Appeals affirmed the order and stated:

> "In the present case the court of chancery was undoubtedly possessed of jurisdiction to make the appointment, even though the jurisdiction was improvidently exercised."

At the same time *Seidler* v. *Branford Restaurant, Inc.* (97 N. J. Equity 531), was decided.

Counsel attempts to distinguish the Greenbaum case on page 24 of his brief. But his distinction is not based upon the facts of the case but upon the use by the Circuit Court of Appeals in this case, in its opinion reversing the order of December 22, 1922, of the term "no jurisdiction."

The court in the Greenbaum case was as much, or as little, without jurisdiction to appoint a receiver as was the court in the instant case to make the order of July 13, 1922. In each case the bill alleged insolvency. In the Greenbaum case the Court of Errors and Appeals held that the insolvency did not exist. Yet that the court had jurisdiction to appoint the receiver and the expense of the receivership were held to be a proper charge against the estate.

In this case, by the order of December 22, 1922, it was adjudged that the corporation was not insolvent but this had no effect upon the power of the court to appoint receivers by the order of July 13, 1922.

When the Circuit Court of Appeals in its opinion (p. 263) held that the District Court was "without jurisdiction" it must have meant, not that the District Court had no jurisdiction to entertain the bill but that, upon it appearing to the court upon the 22nd day of December, 1922, that the corporation was not insolvent, it should have dismissed the bill because the proofs of complainant did not sustain the allegations of the bill, and that the District Court erred in appointing receivers under the terms of the New Jersey statute which permit the appointment of a receiver, notwithstanding solvency, if the corporation is in such condition as that its business is being conducted at great loss, etc. If this be what the Circuit Court of Appeals meant by its decision of August 11, 1923, the power of the court, upon the filing of the bill, to appoint and continue receivers, until the entire controversy was determined both in the District Court and in the Circuit Court of Appeals, is not at all affected.

Moreover, the bill appealed to the inherent jurisdiction of a court of equity. That, under the circumstances present in the instant case, the Court of Chancery of New Jersey has power to appoint a receiver of a domestic cor-

poration without the aid of statute is shown by the case of *Morse* v. *Metropolitan Steamship Co.*, 87 N. J. E. 217, affirmed 88 N. J. E. 325; *In re N. J. Refrigerating Co.*, 95 N. J. Eq. 215 at 221. That, under similar circumstances, the court has the power to appoint receivers of a foreign corporation is indicated by

Babcock v. *Farwell*, 245 Ill. 14, 19 Ann. Cases 74;

Starr v. *Bankers' Union of the World*, 81 Neb. 377, 116 N. W. 61, 129 American State Reports 684;

Culver Lumber and Manufacturing Company v. *Culver*, 81 Ark. 102, 118 American State Reports 17.

These cases all hold that the question as to whether a court of one state will administer the affairs of a foreign corporation is not one of jurisdiction but of power to enforce jurisdiction, and, where the property is, as in this case, wholly within the territory within which the court operates, there is no reason why the court should not act.

The Circuit Court of Appeals, in its opinion (p. 263), did not consider the inherent jurisdiction of the court nor did it consider the question of fact as to whether the corporation was insolvent within the meaning of the New Jersey statute.

It has sustained in the prior case of *Scattergood* v. *American Pipe and Construction Company*, 249 Fed. 23, the jurisdiction of a Federal Court in Pennsylvania to appoint receivers of a foreign corporation where the grant of power to the Common Pleas of Pennsylvania was one of general equity jurisdiction.

It confined itself to the statute of New Jersey and held that, although, by the act of 1912, the law of 1896 was amended so as to provide for the appointment by the Court of Chancery of receivers not only of corporations which had become insolvent but of those which had been

conducted at great loss and greatly prejudicial to the interests of creditors and stockholders, etc., and, although section 96 of that act provides that foreign corporations doing business in the State shall be subject to the provisions of the act so far as they *can* be applied to foreign corporations, the Court of Chancery of New Jersey had no power to appoint receivers of foreign corporations upon the last-named ground, and it rested for its determination upon decisions of the courts of New Jersey,

> *National Trust Company* v. *Miller*, 33 N. J. E. 155;
>
> *Minchin* v. *Second National Bank*, 36 N. J. E. 436,

decided prior to the amendment.

It held that the case of *Atwater* v. *Baskerville*, 89 N. J. E. 121 (V.-C. Lane), affirmed 90 N. J. E. 274, did not apply, although the Court of Chancery in that case had said:

> "The law seems to be well settled that the court of equity has jurisdiction under its inherent power, and that where statutes exist similar to that in this state, then under such statutes, to appoint a receiver of a foreign corporation *upon the ground of insolvency, or upon any other ground which would warrant the appointment of a receiver, to conserve and gather in the assets, either legal or equitable, within the state and to enforce the rights of the corporation, either legal or equitable, which may be enforced against those over whom jurisdiction can be obtained, within the case of Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565." (Italics mine.)

The Court of Errors and Appeals, 90 N. J. E. 275, affirmed this decision without criticising the language used.

Under the statute of New Jersey foreign corporations are subject to the jurisdiction of its courts *to the extent that jurisdiction can be enforced.* Certainly, where all of

the property of a corporation is within the jurisdiction of a court there is no question of power involved, and the question being, under the cases heretofore referred to, not of jurisdiction but of power to enforce jurisdiction, it is submitted that the Court of Chancery of New Jersey unquestionably has power to appoint receivers of a foreign corporation upon the ground that its business is being conducted at great loss and greatly prejudicial to the interests of its creditors and stockholders, if the decree can be made effective, and in this case it could have been.

B. The corporation was insolvent and the District Court had complete jurisdiction to appoint receivers.

The New Jersey statute, as amended in 1912, provides, Sec. 65, C. S. of N. J., 1st Supp., p. 25:

> "Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders any creditor or stockholder may by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the Court of Chancery for a writ of injunction and the appointment of a receiver or receivers or trustees, * * *."

Section 96 (2 C. S. of N. J., p. 1657) provides:

> "Foreign corporations doing business in this state shall be subject to the provisions of this act, so far as the same can be applied to foreign corporations."

It was the established law of New Jersey that, under this statute, as it existed prior to the amendment of 1912, receivers might be appointed by the Court of Chancery of insolvent foreign corporations.

The amendment imported into the statute by the act of 1912 were the words "or if its business has been or is

being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders."

Albert v. *Clarendon Land Investment and Agency Company*, 53 N. J. E., p. 623, in which Vice-Chancellor Van Fleet said:

> "It (referring to the present section 96 of the Corporation Act) was enacted to give this Court the same jurisdiction over foreign corporations doing business in this state, when they become insolvent and have property here, that it exercises over insolvent domestic corporations, so far, at least, as should be necessary for the sequestration of their property here, and converting the same into money."

In *National Trust Company* v. *Miller*, 33 N. J. E. 155, at p. 159, Vice-Chancellor Van Fleet had said:

> "The legislative design was, unquestionably, to confer upon this Court the same powers, in respect to insolvent corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, so far, at least, as the exercise of such powers was necessary to the recovery of any assets whether legal or equitable, which should go in discharge of debts."

And in *Irwin* v. *Granite State Provident Association*, 56 N. J. E. 244, Vice-Chancellor Reed said that the receiver in the State of New Jersey would not amenable to the direction of the domiciliary receiver if one had been appointed.

It was at one time thought by the bar that the language of the Court of Errors and Appeals in *McDermott* v. *Woodhouse*, 87 N. J. E. 615, was broad enough to indicate that there was doubt as to the power of the Court over foreign corporations, but the Court of Errors and Appeals in *Atwater* v. *Baskerville*, 90 N. J. E. 275, set this at rest and said:

"It (McDermott *v.* Woodhouse) expressly recognized the power of our courts to gather in, and control the disposition of the assets of a foreign corporation found within this state. Irwin *v.* Granite State Provident Association, 56 N. J. E. 244."

C. The District Court had jurisdiction to appoint Receivers of a foreign corporation under the New Jersey statute, upon the ground that its business was being conducted at great loss, etc.

But the power of the New Jersey courts to appoint receivers of foreign corporations is not limited to corporations which may be insolvent.

Under the express words of section 65, as amended by the laws of 1912, the courts of New Jersey may appoint receivers of corporations if their business is being conducted at great loss and greatly prejudicial to the interests of its creditors or stockholders.

There is no distinction between the power of the court to appoint receivers of domestic corporations where they are insolvent, or where their business is being conducted at a great loss. The words in the statute are connected with the disjunctive "or."

Section 96 expressly subjects foreign corporations doing business in the State of New Jersey to the provisions of this act, so far as the same *can* be applied to foreign corporations.

The question, therefore, is not of jurisdiction but of ability to make the decree effective. Rather the question is one of discretion in the exercise of jurisdiction.

It is true that Vice-Chancellor Van Fleet in *National Trust Company* v. *Miller*, 33 N. J. E. 155, and in *Albert* v. *Clarendon Land Investment and Agency Company*, 53 N. J. E. 623, spoke of the jurisdiction over *insolvent* foreign corporations, but this was because the statute had given the courts of New Jersey power to appoint receivers of domestic corporations *only* when they were

insolvent, the Vice-Chancellor in each case indicating that it was the intent of section 96 to give the Court of Chancery of New Jersey the *same* powers over foreign corporations as it had over domestic corporations to the extent that the powers *could* be exercised.

That the matter is one of power to enforce jurisdiction is indicated by Chancellor Runyon in *Minchin* v. *Second National Bank*, 36 N. J. E. 436, in which he said:

> "Obviously, there are provisions of the act which *cannot* be applied to such corporations (foreign corporations); for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more."

And the Chancellor further said:

> "The foreign corporation doing business here is subject to the provisions of our statute, so far as its property in this state is concerned."

Atwater v. *Baskerville*, 89 N. J. Eq. 121, affirmed 90 N. J. E. 275, indicates, as do the preceding cases, that there is no distinction between foreign corporations and domestic corporations with respect to the grounds upon which a receiver may be appointed. Receivers of foreign corporations may be appointed upon the same ground as receivers of domestic corporations. *The distinction is as to the powers of the receiver after appointment.* The powers differ because the power of a court over a domestic corporation is broader than its power over a foreign corporation. Domestic corporations may be put to death by a decree of dissolution. Foreign corporations may not. That the distinction is between the extent of the authority of the receivers after appointment and not between foreign and domestic corporations with respect to

the grounds upon which the appointment may be made is indicated by the line of cases heretofore referred to.

In *Minchin* v. *Second National Bank*, 36 N. J. E. 436, the court said:

> "Obviously there are provisions of the act which *cannot* be applied to such corporations; for example, this court cannot hinder such corporations from exercising their franchises, except as it may enjoin them from exercising them in this state. It can sequester their property here and administer it for the benefit of creditors and stockholders, but it can do but little more."

And Vice-Chancellor Van Fleet said in *Albert* v. *Clarendon Land Investment and Agency Company*, 53 N. J. E., p. 623, and in *National Trust Company* v. *Miller*, 33 N. J. E. 155, at p. 159:

> "The legislative design was, unquestionably, to confer upon this court *the same powers*, in respect to insolvent corporations, created by foreign jurisdictions, having property in this state, that it exercised over insolvent domestic corporations, so far, *at least, as the exercise of such powers as necessary to the recovery of any assets, whether legal or equitable, which should go in discharge of debts.*"

And the Court of Errors and Appeals said in *Atwater* v. *Baskerville*, 90 N. J. E. 275:

> "It (referring to McDermott *v.* Woodhouse), expressly recognized the power of our courts to gather in, and control the disposition of, the assets of a foreign corporation found within this state."

The Court of Chancery and the Court of Errors and Appeals in these cases have expressly recognized that, even with respect to insolvent foreign corporations, the Court of Chancery cannot exercise the same measure of control as it can with respect to insolvent domestic

corporations. The measure of control exercised by the courts is not placed by the courts upon the ground of lack of jurisdiction but upon the ground of lack of power to enforce the jurisdiction.

It is not suggested that the Court of Chancery has not the same power to appoint a receiver of a foreign corporation whose business is being conducted at great loss and greatly prejudicial to the interest of its creditors or stockholders as it has to appoint a receiver of a domestic corporation upon the same grounds. When the receiver is appointed of a foreign corporation upon this ground his powers are circumscribed precisely in the same way as the powers of a receiver appointed of a foreign corporation upon the ground of insolvency would be circumscribed but to no greater extent. The court has jurisdiction, and power to enforce that jurisdiction, to gather in the assets of a foreign corporation within the state and to conserve them and to administer them and to distribute them "for the benefit of creditors and stockholders," to use the language of the Vice-Chancellor in *Minchin* v. *Second National Bank*, 36 N. J. E. 436.

The law generally is settled that the question is one of discretion in the exercise of jurisdiction and not one of jurisdiction.

In *Babcock* v. *Farwell*, 245 Ill. 14, 19 Anno. Cases 74, there was a stockholders' suit brought by a stockholder against a corporation, organized under the laws of Great Britain, and other persons, alleging mismanagement on the part of the officers and asking for an accounting. A demurrer was filed to the bill. The demurrer stated as grounds that the Court had no jurisdiction because it had to do with the internal affairs of the corporation and also because the charges set forth in the bill were not sufficient to maintain a cause of action assuming jurisdiction. The demurrer was sustained. The case got to the Illinois

Supreme Court. In that court the same grounds were set up. The Court declined to decide the case upon the jurisdictional ground. It decided it upon the merits. With respect to the jurisdictional ground it said, referring to the rule that the courts of one state will not interfere with the internal affairs of corporations of another state:

> "Except in cases involving the exercise of visitorial powers, the question is *not strictly one of jurisdiction, but rather of discretion in the exercise of jurisdiction.* The reasons which influence courts of chancery to refuse to interfere in the management of the internal affairs of a foreign corporation are, that the rights arising between a corporation and its members out of such management depend upon the laws of the state under which the corporation is organized; that the courts of that state afford the most appropriate forum for adjudication upon the relation between the stockholders and the corporation, and that frequently such courts alone possess power adequate to the enforcement of all decrees that justice may require. *It is the inability of the court to do complete justice by its decree, and not its incompetency to decide the question involved, that determines the exercise of its power.* The general statement that the courts will not interfere with the management of the internal affairs of foreign corporations must be construed in connection with the particular facts. *The rule rests more on grounds of policy and expediency than on jurisdictional grounds; more on want of power to enforce a decree than on jurisdiction to make it.*"

This language of the Illinois Court was cited with approval in *Chicago Title and Trust Company* v. *Newman*, Circuit Court of Appeals for the Seventh Circuit, 187 Fed. 573. One of the questions in that case had been the power of a state court to appoint a receiver at the suit of a stockholder upon the ground that the foreign corporation contemplated action which would result in injury to the stock-

holder. The Circuit Court of Appeals, speaking by Judge Sanborne, said:

> "*Strictly speaking, there never was any question of jurisdiction in the case.* It was one of equity power. A court of equity will not, as a general rule, administer the internal affairs of a foreign corporation. As decided by the Supreme Court of Illinois in Babcock *v.* Farwell, 245 Ill. 14, 33; 91 N. E. 683, *the question is not strictly one of jurisdiction, but rather of discretion in the exercise of jurisdiction.* And the Supreme Court of the United States has often had occasion to make the same distinction. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783; Bache *v.* Hunt, 193 U. S. 523, 48 L Ed. 774; Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159; see also *re* Hill Co., 159 Fed. 73."

In *Starr* v. *Bankers' Union of the World*, 81 Neb. 377, 116 N. W. 61, 129 American State Reports 684, there was an application to appoint a receiver because of *ultra vire* acts committed by the defendant. The court said:

> "That a court should not appoint a receiver to administer the internal affairs of a foreign corporation is a very general rule, *the reason for which is that the court cannot obtain control of all the property, books, records and members of the corporation so as to do full justice between all the parties interested, but the operation of this rule ceases when the reason for it no longer exists,* and *whatever might be the objection to appointing a receiver for the property for a foreign corporation found in this state where such property is only part of its assets, and where the books and records and officers of such corporation are beyond the process of the court, they do not apply in this case.* * * * None of the ordinary reasons why the courts of this state should not take jurisdiction of these assets remained, but whether the suit in which the receiver was appointed is considered as one to subject the assets of the foreign corporation found in this state to the payment of its debts, or whether it be considered as a suit to administer and wind

up the affairs of such corporation, every reason exists why the courts of this state should take jurisdiction."

In *Culver Lumber and Manufacturing Company* v. *Culver*, 81 Ark. 102, 118 American State Reports 17, a bill was filed by a stockholder setting up that the business of the company, which was a foreign corporation, had been extravagantly and recklessly conducted, and that it was in a condition where if the business continued there might be attachments begun by creditors, and as the Court said—

"At the time of the institution of this suit the property of the corporation was in a precarious condition. It was threatened with attachment by creditors, which begun, it being a foreign corporation and considerably in debt, the probability is all the creditors, for their own protection, would have been forced to attach. In that event the probable result would have been the sacrifice of its property and hopeless insolvency. Its officers were recklessly and extravagantly managing its business affairs, involving it in debt, and converting its property to their own use. Its board of directors, although requested to do so, refused to interfere. The interposition of a court of equity and the appointment of a receiver were necessary, and demanded for the protection of stockholders and creditors."

"Courts of equity have no right or authority to dissolve a foreign corporation, or wind up its business, *but they may, in cases like this, take charge of its property within the jurisdiction of the court, and enforce the rights of creditors and stockholders in respect to the same, where it can be done by the exercise of equity jurisdiction.*"

In *Scattergood* v. *American Pipe and Construction Company*, 249 Fed. 23, Circuit Court of Appeals for the Third Circuit, sustained the appointment of receivers of the American Pipe and Construction Company, a corporation of New Jersey and having property in Pennsylvania

as well as in New Jersey. The United States District Court, for the District of Pennsylvania, appointed a general receiver of the corporation, although there was no allegation of insolvency. The question was raised in the Circuit Court of Appeals as to the jurisdiction of the District Court over the corporation because it was a New Jersey corporation. That court sustained the jurisdiction. The court cited Pennsylvania cases and said:

> "Among the Pennsylvania cases may be mentioned Bank *v.* Construction Co., 242 Pa. 269, 89 Atl. 76, where the state courts exercised jurisdiction over a New Jersey corporation 'with a principal office in Philadelphia, engaged largely in building railroads and in public contracts,' settled its affairs, and wound up its business; and Blum Bros. *v.* Girard Bank, 248 Pa. 148, 93 Atl. 940, Ann. Cas. 1916D 609, where the Common Pleas Court appointed receivers for a New Jersey corporation doing a mercantile business in Philadelphia, although the bill averred that the corporation was solvent, being in possession of assets far in excess of its liabilities, but was temporarily embarrassed by reason of a stringent money market and other circumstances."

This case is direct authority in the case at bar.

To say that the appointment of a receiver of a going corporation, removing its assets from the control of its board of directors and placing them in the hands of a receiver authorized to carry on the business, is not an interference with the internal affairs of a corporation is impossible.

If the court of a foreign district may go so far as the court went in the Scattergood case then unquestionably the court may proceed to wind up the affairs of a foreign corporation, in so far as the administration and liquidation and distribution of its property within the state is concerned, for the benefit of its creditors and stockholders.

Albert v. *Clarendon Land Investment and Agency Company*, 53 N. J. E. 623;

National Trust Company v. *Miller*, 33 N. J. E. 155;

Minchin v. *Second National Bank*, 36 N. J. E. 436;

Atwater v. *Baskerville*, 89 N. J. E. 121, affirmed 90 N. J. E. 275;

Culver Lumber and Manufacturing Co. v. *Culver*, 81 Ark. 102, 118 American State Reports 17, 99 S. W. 391;

Starr v. *Bankers' Union of the World*, 81 Neb. 377, 116 N. W. 61, 129 American State Reports 884;

Babcock v. *Farwell*, 245 Ill. 14, 19 Anno. Cases 74.

And in *Central Trust Company* v. *McGeorge*, 151 U. S. 129, 38 L. Ed. 99, this court reversed the Circuit Court in dismissing a bill filed by a non-resident creditor against a foreign corporation praying for the appointment of a receiver and the liquidation of the affairs of the company within the state.

The extent to which the United States District Court will administer the provisions of the state statute is indicated by the opinion of Judge Davis in *Kessler* v. *Necker*, 258 Fed. 654.

The District Court had full and complete jurisdiction to appoint a receiver of the defendant, the Delaware corporation under the provisions of the New Jersey statute even if the corporation were not insolvent, or potentially insolvent, because its business was being conducted at great loss and greatly prejudicial to the interest of its creditors or stockholders.

D. Aside from the New Jersey statute the Court had inherent jurisdiction to appoint a Receiver upon the facts proven.

In *Scattergood* v. *American Pipe and Construction Co.*, 249 Fed. 23, the only statute relied upon by the Circuit

Court of Appeals was a statute of Pennsylvania which gave to the courts of common pleas the supervision and control over corporations.

This statute merely gave to the Court of Common Pleas the power of the English Court of Chancery over corporations. That power is possessed by the Court of Chancery of New Jersey and is likewise possessed by the federal courts and the federal court jurisdiction in equity cannot be narrowed by either a statute of the state or a judicial decision thereof.

Mississippi Mills v. *Cohn*, 150 U. S. 202, 37 L. Ed. 1052;

Guffey v. *Smith*, 237 U. S. 101 114.

The Circuit Court of Appeals in the Scattergood case, cited with approval the case of ***Bank*** v. ***Construction Co.***, 242 Pa. 269, 89 Atl. 76, where the state court exercised jurisdiction over a New Jersey corporation "with a principal office in Philadelphia, engaged largely in building railroads and in public contracts" settled its affairs, and wound up its business, and it likewise cited with approval *Blum Bros.* v. *Girard Bank*, 248 Pa. 148, 93 Atl. 940, Ann. Cas. 1916D 609, where the Common Pleas Court appointed receivers for a New Jersey corporation doing a mercantile business in Philadelphia, although the bill averred that the corporation *was solvent*, being in possession of assets far in excess of its liabilities, but was temporarily embarrassed by reason of a stringent money market, and other circumstances.

In *Babcock* v. *Farwell*, 245 Ill. 14, 19 Ann. Cas. 74, the court, in holding that the question whether the courts of one state will exercise jurisdiction over the affairs of a corporation of another state, was one of discretion in the exercise of jurisdiction and not a question of jurisdiction, was referring to the common law power of a court of equity.

In *Starr* v. *Bankers' Union of the World*, 81 Neb. 377, 116 N. W. 61, 129 American State Reports 684, in which the court sustained the power of the courts of a state to administer the affairs of a foreign corporation where the property was within the jurisdiction of the court, the court was relying upon the inherent power of a court of equity and not upon a statute.

And so in *Culver Lumber and Manufacturing Company* v. *Culver*, 81 Ark. 102, 118 American State Reports 17.

Nor did it appear that there was a statute involved in *Central Trust Company* v. *McGeorge*, 151 U. S. 129, 38 L. Ed. 99.

That the New Jersey Court of Chancery has the inherent jurisdiction under its general equity power to appoint a receiver of a corporation not insolvent, and actually wind up its business is settled by *Morse* v. *Metropolitan Steamship Company*, 87 N. J. E. 217, affirmed 88 Eq. 225. In that case the Court of Chancery (Lane, V.-C.), said:

> "I do not find that the courts of this state have in anywise limited the general doctrine which prevails in England and throughout this country that whenever because of gross abuse of trust, because of dissension among the members of the board of directors or the stockholders, because there is no properly constituted board, or because the company has failed of its purpose, there is a necessity for judicial intervention, a court of equity may intervene under its general jurisdiction and appoint a receiver and grant such other relief as may be necessary. The text book authorities are to the effect that the power exists, but that, of course, it must be exercised with discretion. * * *"
>
> "I am willing to say that if it were necessary to sustain the jurisdiction of this court upon the present bill I would, as presently advised, hold that this court may, if the circumstances indicate that the corporation cannot properly be conducted by

> reason of the fact that no competent, proper board of directors can ever be elected, under its general equity power, actually wind up the corporation and divide its assets."

In that case it appeared that the majority of the stock was in the control of those whom it was alleged had perpetrated the fraud on the corporation and hence the language of the court.

That the doctrine of this case may be applied to foreign corporations we submit is settled by the affirmance of the Court of Errors and Appeals in *Atwater* v. *Baskerville*, 90 N. J. E. 275, in which case in the court below, the Court said (89 N. J. E. 121, at p. 127):

> "The law seems to be well settled that the court of equity has jurisdiction under its inherent power, and that where statutes exist similar to that in this state, then under such statutes, to appoint a receiver of a foreign corporation *upon the ground of insolvency, or upon any other ground which would warrant the appointment of a receiver.* * * *"

The question as to whether the court will, under its inherent power, interfere with the affairs of a foreign corporation is the same as the question as to whether it will interfere where the power is conferred by statute, to wit, the question of discretion in the exercise of jurisdiction.

II.

THERE WAS SUCH ACQUIESCENCE IN THE JURISDICTION OF THE COURT AS THAT THE EXPENSES OF THE RECEIVERSHIP MAY PROPERLY BE CHARGED AGAINST THE CORPORATION.

The District Court (p. 276) and the Circuit Court of Appeals (p. 580) so held.

As stated by both courts, the question of jurisdiction which led to the reversal by the Circuit Court of Appeals of the order of December 22, 1922, was not raised or suggested until a few days prior to the decree of December 22, 1922, and then, in a contempt proceeding, so says the opinion of the Circuit Court of Appeals, *it was intimated*. It was not mooted on the hearing on the decree of December 22, 1922, and was, in fact, first raised upon the argument of the appeal from that order which took place during the March Term, 1923, of the Circuit Court of Appeals.

Counsel on page 14 still goes back to the matter of jurisdiction under section 51 of the Judicial Code, which was expressly waived.

Counsel says (p. 15) that, prior to the order of July 13, 1922, there was certainly no acquiescence. *There certainly was acquiescence in the jurisdiction of the court upon the point now argued.* The parties litigated upon the meritorious question of first, whether there was insolvency or solvency and second, whether the business was being conducted at great loss and greatly prejudicial to the interest of creditors and stockholders. Counsel for the corporation on the argument which led to the order of July 13, 1922, expressly stated in his brief that upon the second ground the court would have jurisdiction upon final hearing to appoint receivers.

Counsel expressly waived any point of jurisdiction based upon section 51 of the Judicial Code.

There never was any objection to the jurisdiction of the District Court as a federal court insisted upon and, as this court in *Pusey and Jones Company* v. *Hans Karluf Hanssen*, 261 U. S. 491, 67 L. Ed. 763, such lack of equity jurisdiction (if not objected to by defendant) may be ignored by the court in cases where the subject matter of the suit is of a class of which a court of equity has jurisdiction. And where the defendant has expressly consented to action by the court, or has failed to object seasonably, the objection will be treated as waived.

In this case, there was no objection made upon the ground of lack of equity.

Instead of appealing from the order of July 13, 1922, Crossman secured a resolution of the Board of Directors *admitting bankruptcy* and attempted to have the corporation adjudicated a bankrupt in Delaware, *although contending at the same time in New Jersey that the corporation was solvent.*

When an appeal was finally taken from the order of December 22, 1922, no application for a supersedeas was made. Counsel says, in explaining why the order of July 13, 1922, was not appealed, (p. 15)

> "but the directors of the petitioner so far disregarded it that they were cited for contempt."

This is not a proper way to review an appealable order.

Counsel says that upon the final hearing petitioner moved "to discharge the orders of May 11th and July 13th, 1922," (p. 15 of his brief). There is nothing in the record so indicating and it is not a fact that any such motion was made.

Acquiescing, as it did upon the hearing which resulted in the order of July 13, 1922, in the jurisdiction of the District Court to make a final decree, it must have acquiesced in the jurisdiction of the court to, through its receivers,

operate the property in the meantime, but, as argued above, whether it acquiesced in the jurisdiction or not the court, unquestionably, had jurisdiction upon the bill *as filed* to operate the property through receivers pending final determination.

There was no time when acquiescence ceased.

Under his subdivision 4 of Point II counsel, on page 31, refers to the failure to appeal from the order of July 13, 1922, and no inference is to be gathered from anything that he there says that any attack was made upon the order of May 11, 1922, for lack of jurisdiction.

The effect of the failure to appeal from the order of July 13, 1922, when an appeal might have been taken and a supersedeas applied for is stated in the case of *Pagett* v. *Brooks*, 37 Southern 263 (140 Ala. 257), hereafter referred to.

Counsel seems to conceive that the institution of bankruptcy proceedings in Delaware, claimed to have been instituted in violation of the injunction of the District Court was more effective evidence of non-acquiescence in the order of July 13, 1922, than an appeal would have been (p. 26 of his brief).

Counsel would seem to infer that where its jurisdiction is conceded upon the record the District Court must take notice of statements made in other proceedings attacking its jurisdiction. Was the District Court, because of the suggestions made in the contempt proceedings, to forthwith discharge its receivers?

Under his subdivision 5 of Point II counsel argues that the vigorous opposition to the appointment of receivers upon other grounds was equivalent to questioning the jurisdiction of the court. This is, of course, not so, for the moment the jurisdiction of the court is conceded then the decree, which is sought to be reviewed by cer-

tiorari, is unquestionably right for, when the jurisdiction of the court is conceded, it must be also conceded that the orders of July 13, 1922, and May 11, 1922, providing for the temporary receivers, were correct for the court in that event would have the right to preserve the property *pendente lite*, and the receivership would not be, as indicated by counsel on page 28, to "a void receivership."

III.

POINT III OF PETITIONER'S BRIEF.

In his Point III counsel says acquiescence cannot possibly justify indebtedness incurred after the acquiescence ceased.

The difficulty is that acquiescence in the order of July 13, 1922, never ceased and it is under *that* order that the respondents have been continuously in possession of the property of the defendant corporation. True, the defendant attacked the decree of December 22, 1922, and raised in the Circuit Court of Appeals the question of the jurisdiction of the court but the District Court could not be expected to, *upon that mere suggestion,* revoke its order of July 13, 1922. It therefore was obliged to leave its receivers in charge until the determination by the Circuit Court of Appeals of the validity of the decree of December 22, 1922. Having acquiesced in the jurisdiction of the court so far as the order of July 13, 1922, was concerned the corporation must be held to have acquiesced in all of the results which might flow from an exercise of jurisdiction by the District Court.

IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER FEDERAL COURT.

In *Couper* v. *Shirley*, 75 Fed. 168, cited by counsel for petitioner, the court said:

> "It must be borne in mind that the appointment of Couper as a receiver was *not* made by virtue of any of the established general principles of equity, which, *when alleged to exist, would authorize a court of equity to appoint a receiver, but was made solely in pursuance of the stipulation contained in the mortgage.*"

In the case at bar the appointment of the receiver *was* made by virtue of the general principle of equity which permits a court to protect property pending a determination of a cause, and the language in the Couper case clearly indicates that, in the view of the court, if such were the situation, allowances could be made out of the fund.

In *Beech* v. *Macon, etc. Co.*, 125 Fed. 513, the attack was upon the very order of appointment and the court said:

> "It is a principle of general application that, if the appointment of a receiver is erroneous or void, *and the adverse party does not acquiesce in it but continues to contest it to a successful determination*, etc."

And again the court said:

> "The property having been taken from the defendants against their consent under an erroneous order, *which they resisted successfully in an appellate court.*"

To indicate the distinction between that case and the one at bar it is only necessary to again refer to the fact that the order of July 13, 1922, under which the receivers acted, was never directly attacked.

In *Chicago* v. *Newman*, 187 Fed. 573, p. 18 of petitioner's brief, the proceedings were attacked from the very inception upon the precise ground of jurisdiction determined by the court.

In *Fryer* v. *Weakley*, 261 Fed. 509, there was a direct attack upon the order of appointment.

The case of *Brictson Mfg. Co.* v. *Woodrough*, 248 Fed. 484, p. 19 of petitioner's brief, was one in which the court said:

> "* * * *neither pleadings nor proof brought the controversy within the chancellor's reach.*"

In the instant case the pleadings *did* bring the controversy within the reach of the court.

In re Hurlburt Motors, Inc., 275 Fed. 62, p. 19 of petitioner's brief, is the opinion of a district court judge concededly opposed to the opinion of the Circuit Court of Appeals for the 7th Circuit *in re T. E. Hill Company*, 159 Fed. 73. In this latter case a petition in bankruptcy was filed and a receiver appointed. Subsequently the bankruptcy proceedings were dismissed upon the ground "that the corporation was not subject to adjudication as a bankrupt."

T. E. Hill Company, 159 Fed. 73, will be hereafter mentioned.

In *Hawes* v. *First National Bank of Madison*, 229 Fed. 51, the attack was upon the jurisdiction of the federal court *as such*, the requisite diversity of citizenship not being present.

Lion Bonding Company v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151, has no application here for in that case the objection was to the jurisdiction of the District Court *as a federal court*. See *Lion Bonding Company* v. *Karatz*, 262 U. S. 75, 67 L. Ed. 871. And this Court in the Lion

case distinguished *Palmer* v. *Texas*, 212 U. S. 118, 53 L. Ed. 435, upon that ground.

Here there was no attack upon the jurisdiction of the federal court *as such*. Counsel, however, persists in arguing that the federal court had no jurisdiction by reason of the non-residence of both parties referring to judicial code 51 which confers but a personal privilege which may be waived and which was waived and which therefore does not go to the jurisdiction.

Whatever attack there is upon the jurisdiction of the District Court is not to it as a federal district court but in reality for want of equity and as this Court in *Pusey & Jones Company* v. *Hans Karluf Hanssen*, 261 U. S. 491, 67 L. Ed. 763, says, this might be ignored by the court where the subject matter of the suit is of a class of which a court of equity has jurisdiction.

V.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THIS COURT, THE LOWER FEDERAL COURTS AND COURTS OF OTHER JURISDICTIONS.

A. Cases in this Court.

The controlling case is *Palmer* v. *Texas*, 212 U. S. 118, 53 L. Ed. 435, which counsel seeks to distinguish on page 22 of his brief. The state court appointed receivers of a corporation. Thereafter a bill was filed by a stockholder in the United States Circuit Court praying for the appointment of a receiver, the corporation waived the service of subpoena, confessed the averment of the bill and a receiver was appointed. The federal receiver took possession of the property. The State of Texas then applied to the Circuit Court to set aside the order appointing the receiver. This the Circuit Court refused to do, whereupon an appeal was taken to the Circuit Court

of Appeals and that court held that the state court had first acquired jurisdiction and vacated the order of the Circuit Court appointing the receiver and remanded the case to the Circuit Court with directions to discharge the receiver, and to tax all the costs of the receivership against the complainant. This Court held that the state court having first acquired jurisdiction "such property is withdrawn from the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty." *In other words, the property over which the federal court appointed its receiver was beyond its jurisdiction.* This Court said that the Circuit Court of Appeals was right in reversing the order appointing the receiver but was wrong in allowing costs against complainant and this Court said:

> "The receivership has gone on pending the proceedings upon appeal, and we are of the opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal Court."

In distinguishing that case from this counsel says (p. 23 of his brief) that in that case "the receivership was erroneous. In this case, the court had no jurisdiction to seize the property through its receivers."

In the Palmer case this Court said that the property of the corporation at the time of the appointment of a receiver by the Federal Court was "withdrawn from the jurisdiction of the Federal Court as effectually as if it had been entirely removed to the territory of another sovereignty." The property of the defendant corporation being withdrawn from the jurisdiction of the court it is hard to say that the Federal Court had jurisdiction to appoint a receiver over it. Nor is it correct to say that the court in the instant case had no jurisdiction to seize the property through its receivers. The bill filed

made a case appropriate for the appointment of receivers. The court had jurisdiction to appoint receivers by the order of July 13, 1922, *pendente lite*.

Atlantic Trust Co. v. *Chapman*, 208 U. S. 360, 52 L. Ed. 528, is important as indicating the power of a court of equity to appoint receivers and the general principles of equity recognized as applicable to receivers so appointed. This Court declined to hold a complainant personally liable for a receivership deficiency. The court said:

> "When a court exercising jurisdiction in equity appoints a receiver of all the property, the court assumes the administration of the estate; the possession of the receiver is the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. * * * A receiver, as soon as he is appointed and qualifies, comes, as we have said, under the sole direction of the court. The contracts he makes or the engagements into which he enters, from time to time, under the order of the court, are, in a substantial sense, the contracts and engagements of the court. *The liabilities which he incurs are liabilities chargeable upon the property under the control and in the possession of the court, and not liabilities of the parties. They have no authority over him and cannot control his acts.*"

B. Other Federal Cases.

In T. E. Hill Company, 159 Fed. 73, a petition in bankruptcy had been filed and a receiver was appointed. Subsequently the bankruptcy proceedings were dismissed upon the ground "that the corporation was not subject to adjudication as a bankrupt." During the proceedings the property was in the hands of a receiver and "the

only contest or objection raised in the course of the proceedings was to the adjudication of bankruptcy." The fees of the receiver and counsel were allowed out of the estate. There was an appeal, and the court said:

> "On behalf of this assignee it is contended that he is entitled to the corporate assets 'without any deduction for the expenses of the receivership'—in effect it was not within the power of the court, after dismissal of the petition for adjudication of bankruptcy, to award payment for expenses or compensation of the receiver out of the funds in the custody of the court. The only reviewable question under his petition rests on this broad proposition, and it cannot be upheld, as we believe, when the jurisdiction of the district court over the subject matter is ascertained and recognized. Upon the filing of the petition for an adjudication against the corporation and service of process, jurisdiction over parties and subject matter was established. * * * was complete for the hearing and determination of all the issues involved, whatever the ultimate conclusions of the court upon such issues * * * the power and duty of the court, in such case, is unquestionable, to appoint a receiver, when found necessary for preserving—the estate in controversy, and take charge of the property * * * after the filing of the petition and until it is dismissed or the trustee qualified. This preservation of *res* and *status quo* is an elementary requirement in bankruptcy when ground appears for the exercise of such power, and until the issues are decided the jurisdiction is exclusive. The receiver, upon his appointment and acceptance, becomes the officer and hand of the court in the performance of his duties, neither subject to the wishes or directions of the parties, nor dependent upon the result of the controversy for payment of expenses or services; and he is clearly entitled to protection by the court, in the exercise of such jurisdiction for all expenses rightly incurred, services rendered under its order either in allowance out of the funds committed to

his charge, or through provision otherwise made by the court to that end. *The rule thus settled in reference to receivers in equity* (High on Receivers, section 797; Smith on Receiverships, section 350) applies with special force for protection of these statutory receivers." (Italics mine.)

The authority of this case is not questioned in *re Aschenbach*, 183 Fed. 305.

Although the bankruptcy act only permits the adjudication of corporations engaged in certain classes of business which, by the petition it was alleged to be engaged in, in *re New England Breeders Club*, 169 Fed. 586, held that the fact that the corporation was not engaged in the business which, by the petition it was alleged to be engaged in, was not a matter which went to the jurisdiction of the court. The court said:

"If it be true as the Supreme Court has thus held by implication that insufficient allegation of the respondent's business does not deprive the District Court of jurisdiction of the petition in involuntary bankruptcy *a fortiori* the District Court is not deprived of jurisdiction by proof that this allegation is untrue."

And it was likewise so held in the District Court of Pennsylvania in *re Wilkes-Barre Light Company*, 235 Fed. 807.

In *re Hill Company* was apparently approved by Judge Haight in *re Weissbord*, 241 Fed. 516, and Judge Haight there said:

"The petition was not dismissed, because the court never had jurisdiction to hear and determine whether the respondent had committed an act of bankruptcy, or to appoint a receiver in the interim, but because, after it was found that an act of bankruptcy had not been committed, *it was without jurisdiction to wind up the respondent's affairs and distribute his assets among his creditors.*" (Italics mine.)

So here. Assuming that the Circuit Court of Appeals is correct in its holding upon the original appeal that the federal district court had no jurisdiction to appoint a receiver under that provision of the New Jersey statute, permitting the appointment of receivers because a business of a corporation is being conducted at a great loss and greatly prejudicial, etc., it was not determined that the District Court had no jurisdiction to appoint receivers upon the filing of the bill nor that it had no jurisdiction to appoint receivers by the order of July 13, 1922, because the allegations in the bill made out a case of insolvency and upon the bill as filed and the proofs made the court had the unquestioned right to appoint receivers *pendente lite*. The failure of proof, if failure there was, does not affect the original power of the court.

C. Cases in New Jersey.

Greenbaum v. *Lafayette & Broad Realty Corporation*, 97 N. J. Eq. 536. In that case although the Court of Appeals reversed the order appointing receivers upon the ground that the proofs did not show that the corporation was insolvent, nevertheless it held that the expense of the receivership should be first made out of the property in the control of the receivers.

In *Stokes* v. *Knickerbocker Investment Company*, 70 N. J. Eq. 518, a receiver had been appointed on an *ex parte* application. Upon the hearing it appeared that the receiver should be discharged and the court declined to continue him. Notwithstanding this, Vice-Chancellor Bergen afterwards Supreme Court Justice, held that the reasonable expenses of the receiver should be paid by the defendant company.

D. Cases From Other Jurisdictions.

A case almost exactly in point is *Pagett* v. *Brooks*, 37 Southern 263, 140 Ala. 257. The Chancellor had appointed a receiver to protect property *pendente lite*. The case was decided in favor of the defendants and the bill dismissed. A suit was brought on a bond given by the complainants to indemnify the defendants when the receiver was appointed. There was a judgment for plaintiff and the court reversed it. There was a statute permitting an appeal from the order appointing a receiver. No appeal had been taken. The court said:

> "The failure of the plaintiffs (the defendants in the equity suit) to object to the order, and in the event the objection was overruled, to prosecute their appeal as provided by the statute, *must be held to be an acquiescence by them in it so as to prevent them questioning its propriety upon final hearing of the case.* As inferentially sustaining the correctness of this proposition Campbell *v.* Claflin, 135 Alabama 27, 33 Southern 275; * * * Furthermore, it cannot be conceded that the decree dismissing the bill although finally disposing of the case on its merits, adversely to the complainants therein, at whose instance the receiver was appointed *ipso facto* discharged him. His functions must be determined by a formal order of the court."

This case is analogous to that at bar. Under the federal statute the corporation might have appealed from the temporary orders. It did not do so and therefore, under the doctrine of the case last cited, *it must be held to have acquiesced in their propriety;* and this must be so for upon the bill *as filed* which alleged insolvency the District Court had jurisdiction under the decision of the Circuit Court of Appeals.

> "It is the initial pleading rather than the facts as they afterwards developed, which determines the authority of the court to hear a cause."

15 C. J. Title Courts, section 169.

> "A court has judicial power to hear and determine the question of its own jurisdiction it is not bound to dismiss the suit on a mere allegation but may inquire into the correctness of the averment. So it may receive testimony on a preliminary question to determine its jurisdiction."

11 Cyc. 701, 15 C. J. Title Courts, section 170, page 851.

And see *Moore* v. *New York Cotton Exchange*, 270 U. S. 593.

The District Court had control of the parties and, having such control it had power to determine its own jurisdiction and to retain the cause for that purpose *and in the meantime to protect the property.*

> "Courts of Chancery as well as other courts in the various states which exercise a general jurisdiction in equity and the judges thereof * * * have inherent jurisdiction to appoint receivers."

34 Cyc. 101.

The purpose is to protect the *res pendente lite* and there is no determination on the merits. *High on Receivers*, sec. 4 and 7.

In the memorandum (p. 249) the District Court expressly stated that the receivership established by the order of July 13, 1922, was for the purpose only of protecting the property pending final hearing.

This it would have the right to do under its inherent jurisdiction, aside entirely from the statute, even if its jurisdiction were questioned, so that the property might be protected until its jurisdiction was determined. Any other holding would mean that, although the court has judicial power to determine its own jurisdiction (having control of the parties) it would have no power to protect the property until that jurisdiction was determined. An absurd condition.

But in this case there was also acquiescence in the power of the court to make these provisional orders.

In re Kayser's Estates, 92 Minn. 444; 100 N. W., p. 214, an order had been made removing an executrix and appointing a receiver. This order was reversed. The court by order allowed the receiver $1,000 for compensation out of the fund. The order was affirmed. The court said,

> "It does not necessarily follow that he (the receiver) was discharged as receiver, and that the court lost jurisdiction of the subject matter because the judgment entered on April 8, 1901, reversed the order of the probate court and re-instated respondent as executrix of the estate. Whether a discharge follows determination of the suit depends on the exigencies of the case." High on Receivers, 33: "* * * Our conclusion is that, while the judgment reversing the order of the probate court had the effect of removing the necessity for his continuance it did not in itself discharge the receiver. It was the duty of the appellant at that time to close his account and be discharged."

In *Irelands* v. *Nichols*, 40 Howard Practice 85 (New York), the court said,

> "In the present case, the appointment of a receiver was a provisional remedy in the action and ancillary to it * * * (Just as in this case). According to the current authorities the entry of the judgment in favor of the defendant, had the effect of ending the functions of the receiver, but the receiver is not discharged thereby. The court may according to the exigencies of the case, upon good cause shown, either continue or discharge him by a further order. Upon an examination of the peculiar facts of this case I have come to the conclusion that the receiver should be discharged. I hereby appoint * * * as referee to pass the accounts of the receiver *and upon the confirmation of the referee's report the receiver will be required to pay over the funds, less all proper charges to* * * *."

And in *Simmons* v. *Shelton*, 21 Southern 309 (not officially reported), a receiver had been appointed upon a creditor's bill. The bill was dismissed and the receiver was required within a certain time to account "showing what property or money he has received in order that his receivership may be finally settled."

And in *Fountaine* v. *Mills*, Georgia, 36 Southeastern 428 (not officially reported), it was held that liens or claims against funds in the receiver's hands would be determined in that cause notwithstanding that the bill had been dismissed.

In *Pittsfield Nat. Bank* v. *Bayne*, 140 N. Y. 321, 35 N. E. 631, at p. 633, the New York Court of Appeals expressly said,

> "We do not decide that in all cases where an order appointing a receiver, or an order directing funds to be placed in his possession, is reversed, no commissions can be allowed the receiver. There may be circumstances existing in any such case which would render it matter of discretion whether or not to permit commissions, etc., to the receiver, and with its exercise we would have no right of review, if not abused."

The Illinois Court in *Hughly* v. *Deane*, 168 Ill. 266, 48 N. E. 51, at p. 52, seems to consider the general rule to be that although a receiver may be improperly appointed his compensation is to come out of the property. The question in that case was whether the Chancellor had power, if he desired to exercise it, to tax the costs against a defeated party. It was held that in his discretion he had the right to do so, but in that case it was held that the complainant's bill was based upon a false and fraudulent claim.

It is submitted that there are two cases among those above cited within the principle of either of which, the

instant case falls. *Pagett* v. *Brooks*, 37 Southern 263, 140 Alabama 257, and *T. E. Hill Company*, 159 Fed. 73.

The proceeding under the New Jersey statute is analogous to bankruptcy. The statute is in effect a state bankruptcy act and the same reasons which warrant the appointment of a receiver in bankruptcy, *pendente lite*, warrant the court in appointing a receiver *pendente lite* in proceedings under the statute.

The subsequent adjudication in the course of the proceedings that the corporation is, in fact, solvent, or not a corporation subject to the provisions of the act, does not go to the propriety of the appointment of the receiver *pendente lite* for the court had jurisdiction to appoint receivers to preserve the status until the court should determine whether it had jurisdiction to go forward and divide the assets among creditors.

VI.

THE CIRCUIT COURT OF APPEALS DECIDED NO PRINCIPLE OF LAW OF GENERAL APPLICATION AND THE MATTER WAS ONE OF FACT AND DISCRETION.

It recognized the general principles of law laid down by this Court in *Lion Bonding Company* v. *Karatz*, 262 U. S. 640, 67 L. Ed. 1151; *Atlantic Trust Co.* v. *Chapman*, 208 U. S. 360, 52 L. Ed. 528. It decided the case upon a question of fact. An examination of the opinion of the Circuit Court of Appeals (p. 580) will indicate that it (p. 581) expressly recognized the general rule that when a court has appointed receivers of a corporation without jurisdiction to do so, costs and expenses of the receivership are not chargeable against the corporation but must be recovered, if at all, from the plaintiff in the suit. It then recognized the exception to that rule which is where the corporation has acquiesced in the jurisdiction of the

court when it appointed a receiver of a corporation to take over its assets. It then decided that as a matter of fact this case came within the exception. This is therefore the ordinary case. If petitioner's contention be correct the court below, having recognized the general principles of law laid down by this Court, has erred in its determination as to the facts. The matter is one of discretion and no court is better able, with a full knowledge of all the facts, than the Circuit Court of Appeals to exercise the discretion.

VII.

The operations of the receivers resulted in benefit to the property of the corporation in value in excess of the amounts directed by the decree below to be paid by the corporation and to permit the corporation to take its property without paying the indebtedness of the receivers would be to permit the corporation to appropriate to its own use the services of the receivers and the monies of the creditors of the receivers including the holders of receivers' certificates.

Reply to Point V of Brief of counsel for petitioner.

Counsel for petitioner, under his Point V, (p. 31) criticises the account of the receivers which was filed in obedience to the order of the United States District Court entered after the mandate from the Circuit Court of Appeals upon the first appeal (p. 279).

The criticisms now indulged in by counsel were before the Special Master and he reported (p. 424) on Exception No. 1, which was to the effect that the report and account were not sufficiently specific nor properly itemized:

> "It would have been quite impossible for them to have submitted a more specific report with each account itemized without preparing a complete transcript of their books and records, or submitting the books and records themselves."

On Exception No. 2, which was to the effect that the vouchers in support of the disbursements for which credit was claimed were not produced, the Special Master said:

> "There were more than one thousand vouchers in the form of cancelled checks, and that the receivers could not properly submit all of these with their report. I found all of these vouchers were properly numbered, filed in numerical order, and corresponded with the items of disbursement set forth in the cash book as each disbursement was made."

On Exception No. 3, which was to the effect that the analysis of cash receipts for the period of May 11, 1922, to Jan. 31, 1924 was not sufficient the Special Master said:

> "All of the books of account kept by the receivers were received and marked in evidence, that said books were kept in orderly manner and set forth in detail each item of cash receipt, and date of receipt, and the reason therefore and the source of the same."

Upon Exception No. 4, which was to the effect that the analysis of cash disbursements was insufficient because vouchers were not submitted, etc. the Special Master said:

> "That in this case as well as in that of the cash receipts referred to heretofore, it would have been impracticable for the receivers to attach to their report bills or invoices in support of each disbursement, as said bills ran into the thousands. * * I find that the receivers have a bill or invoice to support each disbursement as recorded in the cash book, said bills being numbered as received and filed numerically in orderly manner."

Generally the Special Master said (p. 426):

> "* * * the receivers were examined at length as to their conduct of the business, their knowledge of the operation of the plant and in particular as to their knowledge of the repairs and improvements to the plant; and I find and report that the business was conducted under the personal supervision of the receivers, who, were, at the hearing March

11th, able to state the position and duties of practically every employee whose name appeared in the payroll book, and at the hearing of March 22d, gave a detailed statement from memory of all the repairs made in the plant during their administration."

Finally the Special Master reported (p. 427):

"1. That the report and account made by Alfred L. Kirby and John P. Duffy as receivers of the defendant corporation pursuant to an order by this court made on the 24th day of January, 1924, is true and correct, and in strict conformity with their books of account, invoices, vouchers and other records here in evidence.

2. That the books of account as kept by the receivers are most complete, and their entire accounting system unique, in that, the receivers on order were able to immediately produce invoice and voucher to support any cash disbursement or receipt as selected at random by counsel.

3. That the disbursements made by the receivers, particularly for improvements and repairs, were made so that the plant might be continued in operation, and were made under the supervision and advice of the Mashek Engineering Company, the designers and builders of the plant.

4. The operation and conduct of this business under their receivership has resulted in benefit and profit to the stockholders and creditors to the amount of at least $49,008.41, as shown by Exhibit 1 of April 11, 1924, a copy of which is attached hereto."

A summary of the operations of the receivers, based on the record, was submitted to the United States District Court at the time it made its decree, December 19, 1924, (p. 565) which summary was also submitted to the Circuit Court of Appeals upon the appeal and is now printed as an addendum to this brief.

From it and from the report of the Special Master it appears that the corporation and its property has, by reason of the operation of the receivership and the expenditure of moneys by the receivers, raised by the issuance of receivers' certificates in part, and as a result of the incurring of debts by the receivers, now unpaid, benefitted to an extent in excess of the amount which the corporation has been directed by the decree below to pay. In other words, there has been created by the receivers a fund which is locked up in the property of the corporation, in the improvement of which, etc. the moneys have been expended.

To permit the corporation to take back this property, benefited as it has been by reason of the expenditure of these moneys by the receivers, and the debts incurred by the receivers, would be to permit the corporation to appropriate to its own use the services of the receivers and the moneys of creditors of the receivers, including the holders of receivers' certificates, who advanced their moneys upon the faith of orders of the United States District Court not appealed from, and this result would be accomplished because the Circuit Court of Appeals in the order reversing the decree of the United States District Court appointing permanent receivers used the expression "lack of jurisdiction."

The allowances which were made to the receivers and to counsel were conceded in the District Court and in the Circuit Court of Appeals to be fair, and it is so recited in the decree (p. 565). The amendment of the decree (p. 567) was for the purpose of making it clear that, while counsel for petitioner did not object to the *amount* of the allowances to the Special Master for his report or to the receivers or to counsel, he objected to *any* allowance being

made "in view of the mandate of the Circuit Court
Appeals."

It is respectfully submitted that the decree brought
by the writ of certiorari should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Respondents.

JOSEPH L. SMITH,
Of Counsel.

ADDENDUM, being a summary of the operation by the receivers and the effect thereof.

1. The receivers were appointed on May 11, 1922, and have been in charge of the affairs of the company one year and five months, or seventeen months.

2. In following out the suggestion of the court that the receivers continue the business, "owing to the coal shortage and the prospects for good business," it was obviously necessary (in running an industry of this size), for the receivers to give their entire time and attention to the business.

3. The receivers have been operating under the temporary orders of May 11th and July 13th *from which no appeal was taken*, and necessarily incurred obligations usual in the operating of a business. Had an appeal been taken from the temporary orders, the receivers would have been restrained from running the business pending decision on appeal and naturally would not have incurred obligations or given their entire time and attention to the business.

4. No appeal was taken excepting from the order of December 22, 1922, making the receivership permanent, and the receivers have never operated under this final order, but as this final order was made five months after the receivers actually started operation at the plant producing briquettes and had incurred obligations, it was necessary for the receivers to continue under the temporary orders.

5. An appeal from the final order of the court was only taken after the Board of Directors had failed in every other effort to ruin their own business. We refer first to the order to show cause, filed May 18, 1922, which restrained the receivers from taking any further action with respect to the property of the defendant company until the order of July 13th was made ordering the re-

ceivership continued. Two valuable months in which repairs should have been made to the plant were thereby lost as a result of action by the Board of Directors. And we refer secondly to the action of the President, F. M. Crossman, and his Board of Directors in having the company thrown into bankruptcy on October 5, 1922, which action made it necessary for the receivers to cease purchasing raw materials for almost two months thereafter. This action caused an incalculable loss to the company, as the receivers, on advice of counsel, did not resume the purchase of raw materials, with the result that the coal dust was delivered to the receivers in frozen condition, costing thousands of dollars to unload the cars and in demurrage charges, and the receivers were never able to operate the plant to capacity thereafter owing to the frozen condition of the coal dust.

6. When the receivers took charge there was neither money, organization, raw materials, or a workable plant, any one of which items is requisite to the proper conduct of a business. Yet in spite of this handicap and the opposition of the Board of Directors, as stated above, and an actual operating loss of $14,261.84 by the management sustained during the period January 1, 1922, to May 11, 1922, *the receivers did actually conduct the business successfully and at a profit for the year 1922*, in that on December 31, 1922, the entire loss for the current year January 1st to December 31, 1922, was only $16,452.03. This loss included an item of Reserve for Depreciation amounting to $25,575.26, whereas if the receivers had not carried this item of depreciation a net profit of $9,123.23 would have been the result. We says that the receivers operated the plant successfully and at a profit because they were in charge of the plant only 7½ months, and owing to the restraining order, were permitted to operate only 5½ months, and started with a loss of $14,261.84 as aforesaid.

7. Before the appointment of receivers this company was managed by a General Manager, Mr. Crossman, whose salary was $250.00 per week; a Plant Manager, Mr. Yorsten, whose salary was $100.00 per week; a Treasurer, Mr. Rodeman, whose salary was $50.00 per week; a Chemist, whose salary was $40.00 per week; a Plant Engineer, whose salary was $50.00 per week; a Foreman, salary $45.00; Yard Superintendent, salary $42.50; Weight Master at $30.00 per week; Bookkeeper at $30.00 per week, and Telephone Operator at $12.00 per week.

8. Since the appointment of receivers the plant has been operated under the management of the receivers, who had as their assistants, one Office Manager, one Bookkeeper and one Plant Superintendent, whose salaries aggregated $170.00 per week.

9. Under the original management the loss for the year 1920 amounted to $77,016.38, without any charge for depreciation and under this same management for the year 1921 the operating loss increased $90,334.72, although this item included a charge for depreciation $47,888.99. This depreciation covered a period of two years and thereafter if entered on the books of the company at the proper time, the loss for the year 1920 would have been $100,960.87 and for the year 1921, $66,390.23. Comparing these actual losses with the loss for the year 1922 under receivership, viz., $18,452.03, it is evident that the company has been operated under the receivership far more successfully than ever before.

10. The receivers have improved the product, increased the sales and received more money for the goods than ever before, as showing the following tabulations:

Year	Output Tons	Income from Sales	Rate Per Ton
1920	21,049	$191,132.95	$ 9.08
1921	16,119	$133,387.30	$ 8.27½
1922	17,883	$179,163.81	$10.02
Jan. 1st to Oct. 1st, 1923	14,291	$143,947.56	$10.07

11. Under the old management the sales of briquettes from January 1st to October 1, 1921, amounted to 8,927 tons. From January 1st to October, 1922, 7,229 tons, and from January 1st to October 1, 1923, 14,291 tons; so it is evident that the receivers have increased the sales 100% over last year.

12. Owing to the coal shortage during the winter 1922 and 1923, the receivers naturally had a great opportunity to dispose of their entire production, yet the condition of the plant was such that continuous operation was a physical impossibility, and whereas with two shifts of men working ten hours each, or twenty hours per day, there were from August 1, 1922, to March 15, 1923, 4,540 working hours, the plant was only in operation 1,880 hours; in other words, 50% of the time. The balance of these possible working hours were spent in repairs to the machinery.

13. Prior to appointment of receivers, Mr. Crossman by agreement was entitled to receive 15 cents per ton on all briquettes sold by the company and shortly after appointment of receivers, they notified Mr. Crossman that they would not use the so-called "Cross Formulae" and therefore would not be responsible for any royalties that he might consider himself entitled to. By this action, the receivers saved for the stockholders and creditors up to October 1st this year, royalties that he might consider

himself entitled to. By this action, the receivers saved for the stockholders and creditors up to October 1st this year, royalties on 28,732, or $4,309.80.

14. Up to September 1, 1923, the improvements and addition to machinery and buildings of the company made by the receivers amounted to $53,438.06.

15. The receivers have increased the current assets $18,022.38.

16. The receivers paid out $2,560.89 to cancel the mortgage on the vacant lot adjoining the plant.

17. The receivers paid city taxes for the year 1921 amounting to $5,177.36.

18. The receivers have paid out for insurance of all kinds the sum of $5,180.71.

19. The receivers paid the interest on the mortgage that were sold for cash, the amount being $280.00.

20. For discount and interest on receivers' certificates the sum of $2,394.26.

21. The receivers paid out in extraordinary expenses that would not ordinarily be incurred in the general operation of a business, more than $9,000.00, which item included the cost of investigation of the affairs of the company by certified public accountants, payroll for employees retained by the receivers when the restraining order of May 11th was in effect, demurrage caused by bankruptcy proceedings, etc.

22. It is evident, therefore, that as a result of operation of this company by the receivers the amount of $100,363.16 was accumulated.

23. On October 1, 1923, the receivers owed in accounts payable $19,198.18, and notes payable $4,452.25, and on receivers' certificates $25,000, advance payments on orders $3,463.94, making a total of $52,114.37. There was

still another item of indebtedness, the amount of which was unknown to the receivers, and that is the services of attorneys in Delaware, engaged by the receivers in the bankruptcy action.

24. On October 10th, the receivers paid off one note of $1,500.30, and on the 15th, a note of $2,600, so there is notes payable at the present time of only $351.94.

25. From the above figures it appears that the creditors and stockholders of this company as a result of the management under receivership have been benefitted in one way or another up to the present time in an amount of at least $50,000.

26. The active demand for the product of this company begins October 1st and ends about March 1st, so it must not be forgotten that the receivers have been in charge of the plant eleven months of slack period and only five months when the demand is greatest.